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The Nestle Infant Formula Controversy: Restricting the Marketing Practices of Multinational Corporations in the Third World

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The Nestle Infant Formula Controversy: Restricting the Marketing Practices of Multinational Corporations in the Third World

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INTRODUCTION

Since the beginning of humankind, Woman has successfully breastfed her offspring.[1] Only in the last hundred years has modern technology enabled the woman to cover her breast and invite a manufactured formula into the mouth of her baby.[2] This

1. This comment focuses on newborns less than six months of age.

2. NESTLE S.A., *The Dilemma of Third World Nutrition: Nestle and the Role of Infant Formula* 3 (1982). Manufactured formula is marketed either pre-mixed or in powdered form to which water is added. Solomon, *The Controversy Over Infant Formula*, N.Y. Times, Dec. 6, 1981, at 92, col. 1 [hereinafter Solomon].

Copies of all unpublished materials cited in this comment are on file at the offices of *The Transnational Lawyer*.

trend toward formula feeding began in the industrialized nations and soon shifted to embrace the Third World.[3]

Although formula itself is not harmful, the product imperils infant health when not used under strictly safe feeding conditions. Typically, Third World nations suffer from depressed economies as well as unsanitary environmental conditions, making safe formula feeding an onerous task. Improperly used in developing nations, this product has a devastating effect on the population; formula feeding directly raises the infant mortality and morbidity rate.[4] Once thought to be an innovative reform in the feeding of children, formula has become the harbinger of death to infants in the developing world.[5]

Promotional campaigns of multinational corporations (MNCs)[6] have exacerbated the problem of controlling the use of this potentially dangerous product[7] by luring the unwary Third World

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3. POST & BAER, *The International Code of Marketing for Breastmilk Substitutes: Consensus, Compromise and Conflict in the Infant Formula Controversy*, 25 INT'L COMM'N OF JURISTS, THE REVIEW (Dec. 1980) [hereinafter POST & BAER]. The shift away from breastfeeding and to formula has been labeled "the greatest change in human behavior in recorded history." *Id.* at 52, *reprinted in* Int'l Pediatrics Ass'n, "Recommendations for Action Programs to Encourage Breastfeeding," 4 Bull. of Int'l Pediatrics Ass'n (Oct. 1975) at 18-22. *See* G. PALMER, *The Politics of Breastfeeding* 170-98 (1989) (discussing the development of the history of the formula market) [hereinafter PALMER].

4. *See* POST & BAER, *supra* note 3, at 53. For a general discussion on infant morbidity and mortality rates, see R. LAWRENCE, *Breastfeeding: A Guide to the Medical Profession*, 21-25 (1989) [hereinafter LAWRENCE] and specifically tables 1-11, 1-12, 1-13 on morbidity rates; figures 1-9, 1-10, on mortality rates.

5. Solomon, *supra* note 2. *See* Note, *Formulating Customary International Law: An Examination of the WHO International Code of Marketing of Breastmilk Substitutes*, 5 B.C. INT'L & COMP. L. REV. 377, 379-380 n.23 (1982) (citing 127 CONG. REC. E2405 (daily ed. May 19, 1981) [hereinafter Note, *Formulating Customary International Law*]. "Some 10 million infants and young children annually suffer from malnutrition and diarrhea associated with inadequate breastfeeding and the use of artificial feeding." *Id.*

One 1986 study shows one million infants worldwide died because they were bottlefed instead of breastfed. (Mokhiber, *Why Do We Let Corporations Get Away With Murder?*, NEW AGE J. 46 (Sept./Oct. 1988). *See also* LAWRENCE, *supra* note 4, at 21-25.

6. For the purpose of this comment, multinational is synonymous with transnational corporation, meaning a corporation which owns, in whole or in part, controls, and manages income-generating assets in more than one country. In this way, the corporation engages in international production. HOOD & YOUNG, ECONOMICS OF MULTINATIONAL ENTERPRISE 3 (1979).

7. *See* POST & BAER, *supra* note 3, at 53-54. *See also infra* notes 119-35 and accompanying text.

consumer into the market.[8] Enjoying a healthy profit in the Third World, the infant formula industry has resisted outside attempts to control the promotion of their product.[9] As a result, concerned public interest groups organized a concerted front to expose the infant formula problem in the Third World. These activities captured international attention and culminated in the development of the World Health Organization Code of Breastmilk Substitute Marketing Guidelines.[10] Unfortunately, controversy concerning the interpretation of ambiguous provisions in this Code severely limits its effectiveness. This conflict has yet to be fully resolved.[11] In order to effectively control unsafe formula use, individually affected nations must adopt effective legislation to control the marketing and distribution of infant formula within their borders. Without such legislation, developing nations continue to be haunted by the effects of the misuse of the product.[12]

This comment studies the Third World infant formula controversy, tracing the problem historically and analyzing its present status.[13] Section I compares breastmilk with formula and describes the problems involved with the use and marketing of

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8. *See infra* notes 53-82 and accompanying text (discussing the inherent problems of the Third World consumer in the infant formula marketplace).

9. In 1980, it was estimated that the infant formula industry made over one billion dollars from Third World sales. POST & BAER, *supra* note 3, at 54-55.

10. WHA Res. 34.22, 20 INT'L LEGAL MATERIALS, U.N. Doc. A34/Vr/15 (1981), *Int'l Code of Marketing of Breastmilk Substitutes*, (May 1981) [hereinafter WHO Code].

11. *See* Note, *Influencing Multinational Corporations: The Infant Formula Marketing Controversy*, 10 N.Y.U. J. INT'L L. & POL. 125, (1977); Note, *Spilled "Milk": A Rebuttal to the United States Vote Against the International Code of Marketing of Breast-Milk Substitutes*, 2 B.U. INT'L L. J. 103 (1983) [hereinafter Note, *Spilled "Milk"*]; Note, *Innocents Abroad: Infant Food Technology at the Law's Frontier*, 20 VA. J. INT'L L. 617, (1980); Recent Development, *The Implementation Process of the International Code of Marketing of Breastmilk Substitutes*, 11 SYRACUSE J. INT'L L. & COM. 161, (1984); Note, *Formulating Customary International Law*, *supra* note 5; POST & BAER, *supra* note 3 (all giving an overview of the history and development of the ongoing infant formula controversy); *see infra* notes 119-58 and accompanying text.

12. The infant formula problem is also present in industrialized nations, such as the U.S. *See* J. OF COM. Aug. 7, 1989. This comment, however, focuses on the Third World problem.

13. Infant formula is not the only infant product found to be dangerous in the context of the Third World. Other infant foods, including weaning formulas and feeding tools such as nipples and teats, are part of the infant formula controversy. In order to limit the scope of this comment, however, infant formula will be the central focus.

breastmilk substitutes. Concentrating on the Nestle company,[14] a leading MNC in the infant milk field and the major target of opposition from the international public, Section II discusses MNC exacerbation of the problem through marketing promotion. Section III highlights the World Health Organization (WHO) and World Health Assembly (WHA) efforts to restrict the marketing practices of the infant formula manufacturers. Nestle's response to these restrictions is discussed in Section IV. Section V discloses the difficulties inherent in national government regulation of infant formula and explains the need for national awareness and action. Following the comment's conclusion, model legislation designed for enactment in Third World countries is presented.

I. INFANT FORMULA IN THE THIRD WORLD

A. *Comparison of Breastmilk and Infant Formula For Third World Infants and Mothers*

Breastmilk is the best original fast food[15], made from a recipe of more than a hundred nutrients, many of which are chemically different from those found in formula products.[16] According to most health authorities, "[v]irtually all women can lactate; genuine physiopathological reasons for not being able to breastfeed are

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14. Nestle S.A. is a Swiss parent conglomerate established more than a century ago. NESTLE ENTERPRISES, INC., 1988 ANNUAL REPORT, 1989. *See infra* notes 108-18 and accompanying text (discussing the Nestle Corporation and its structure). Throughout this comment, Nestle refers to Nestle S.A.

15. According to the American Academy of Pediatrics, breastmilk is "the optimal component of nutrition for most infants." Policy Statement by American Academy of Pediatrics, Follow Up Formula, AAP NEWS, Oct. 1988, (statement by the Academy regarding its policy infant formula advertising). For an explanation of breastfeeding in the medical context, see LAWRENCE, *supra* note 4. *See generally* World Health Organization, Report of a Joint WHO/UNICEF Consultation Concerning "Infants Who Have To Be Fed on Breast-Milk Substitutes," Dec. 17-18, 1985 (summarizing the main health and socio-economic circumstances influencing feeding infants breastmilk substitutes).

16. Solomon, *supra* note 2. Although most sources maintain that modified cow's milk formula approximates the macronutrients of human milk, The International Baby Food Action Network (IBFAN) contends that the protein and fat content of cow's milk is too high, while the carbohydrate level is too low for the baby's optimum nutrition. IBFAN & BUNSO, Babies Before Profits 1 (1989) [hereinafter Babies Before Profits].

rare."[17] While poverty interferes with the adequate diet of both the mother and child,[18] even malnourished mothers can breastfeed;[19] only in extreme cases is a mother so poorly nourished that she may not be able to adequately nurse her child.[20]

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17. WHO, PROTECTING, PROMOTING AND SUPPORTING BREAST-FEEDING 6 (1989) (a joint WHO/UNICEF statement) [hereinafter PROTECTING, PROMOTING AND SUPPORTING BREAST-FEEDING]. One study by the WHO stated under one percent of mothers are physically unable to produce enough milk to properly nourish an infant. (A. CHETLEY, THE POLITICS OF BABY FOOD 10 n.31 (1986) [hereinafter CHETLEY] (citing WHO, Provisional Summary Record of the Eighth Meeting of Committee A, Thirty-third WHA Doc. No. A33/A/SR/8, Geneva, May 17 1980, at 11). Several authorities contend that confidence is an important factor in successful breastfeeding, and mothers' lack of confidence is largely due to societal factors. Many women are poorly educated and ill-advised concerning their production of milk. Others may experience embarrassment over the process of breastfeeding itself, as some societies perceive the breast as a sexual object and not a feeding instrument. In addition, the mass introduction of manufactured formula in the public marketplace through promotional techniques has reinforced the belief that women cannot and should not breastfeed. CHETLEY *supra* at 10, 11. *See also* PALMER, *supra* note 3; NGO COMMITTEE ON UNICEF AND NATIONAL COUNCIL FOR INT'L HEALTH, BREASTFEEDING: THE PASSPORT TO LIFE 4-7 (1989) (proceedings of Dec. 10, 1988, meeting at UNICEF House) (describing "insufficient milk syndrome") [hereinafter THE PASSPORT TO LIFE].

18. Although physically able to breastfeed, women who are less than adequately nourished will most likely have smaller than normal babies. PALMER, *supra* note 3, at 48.

19. THE PASSPORT TO LIFE, *supra* note 17, at xx.

20. There remains much controversy in the area of infant nutrition. Studies in developing countries are conflicting in almost every major aspect of breastfeeding. One study by Roger Whitehead, a nutritionist at Cambridge University, showed that lactating mothers in the small Gambian village of Kenebe could only provide adequate nutrition for their infants in the first three months of feeding. After that time, the mothers' milk was unable to meet the infants' nutritional needs. Solomon, *supra* note 2. Dana Raphael, an anthropologist who spent two years studying women of 11 cultures and their feeding methods, found that "many poor and undernourished Third World women are physically unable to breast-feed and others are too preoccupied with the basics of survival to do so." Most nutritionists agree that the vast majority of Third World women should restrict their infant's diet to breastmilk exclusively. However, many believe that after the child reaches three months of age, "a combination of breast feeding and local foods works best." *Id.*

In rare situations, vitamin D, K, or B1 may be lacking in breastmilk and this deficiency can harm the infant. In the case of vitamin D, the baby may develop rickets (causing poor bone development) as a result of the mother's deficiency. Exposure to sunlight for thirty minutes per week maintains an adequate supply of vitamin D, which is stored in the body to be utilized during months without sun. Rarely is a deficiency of this vitamin a problem in sunny countries, although in countries farther north, infants may need vitamin D supplementation to breastmilk, especially in the wintertime. PALMER, supra note 3, at 42-44.

Vitamin K deficiency causes hemorrhagic disease (clotting disorders) in infants. This vitamin can be produced from the ingestion by the baby during childbirth of tiny amounts of bacteria in the mother's feces. In modern practice, the mother is given an enema before childbirth, and the baby is given a vitamin K injection. The vitamin is also found in sufficient quantities in the early milk (colostrum), but if this is denied to a baby who has no other means of obtaining vitamin K, the infant may need some supplemental form of this vitamin. Id.

Breastmilk is ideally suited for use in developing countries, as it is is both economical and convenient.[21] Infant sucking furthers continued milk production, ensuring a constant and fresh milk source.[22] Furthermore, human milk does not require refrigeration until expressed, and some experts maintain it can be safely stored at room temperature for at least eight hours.[23]

Breastfeeding also plays an important role in the health of the infant. Naturally adapted to the immature digestive system of the newborn,[24] breastmilk greatly reduces the incidence of infant gastroenteritis.[25] Mother's milk contains antibodies that serve as an armament for the child against disease.[26] In countries where bacterial growth is fostered by hot climates, polluted water, and

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Infantile beriberi (disease marked by inflammatory or degenerative changes in the heart, digestive system and nerves) is caused by a deficiency of vitamin B1. Women who have been deprived of this vitamin due to an inadequate diet of overpolished rice may pass this deficiency onto their infants. Improved rice processing has all but eradicated the problem of ingestion of overpolished rice. With mothers better nourished, the incidence of infantile beriberi has plummeted. Id.

Additionally, some diseases of the mother may be transmitted through breastfeeding. The HIV virus has been found in some samples of breastmilk. Current sources estimate that approximately 25-50% of HIV positive mothers give birth to babies who will also prove to have the virus. Studies are still in the early stage, and tend to be inconclusive, but UNICEF advises mothers with AIDS to continue breastfeeding their babies. Id. at 53-55. See UNICEF, WHO & UNESCO, FACTS FOR LIFE, 73-75 [hereinafter FACTS FOR LIFE].

"In countries where the risk of death in the first year is 50% from diarrhea and other diseases (exclusive of AIDS), breastfeeding is still the feeding choice because the risk of [an infant] dying from AIDS when born to an infected mother is only 18%. Breastfeeding should be encouraged in developing countries even when the mother has hepatitis or AIDS." LAWRENCE, supra note 4, at 168.

21. A. ALLAIN & A. CHETLEY, PROTECTING INFANT HEALTH: A HEALTH WORKERS GUIDE TO THE INTERNATIONAL CODE OF MARKETING OF BREAST-MILK SUBSTITUTES 6-7 (1989) [hereinafter ALLAIN & CHETLEY].

22. *Id.* Breastmilk is freshly produced at the ideal temperature for the baby.

23. FACTS FOR LIFE, *supra* note 17, at 20. On the other hand, when left standing at room temperature for several hours, cow's milk or milk powder solutions spoil quickly. *Id.* However, some experts take the view that breastmilk, once expressed and left at room temperature, breeds bacteria and spoils even more readily than does formula. Telephone interview with Deborah Aschwanden, Pediatric Nurse Practitioner, Sacramento, CA. (Mar. 23, 1990).

24. Breastmilk is usually digested within 2-3 hours after feeding. ALLAIN & CHETLEY, *supra* note 21, at 6-7.

25. *Id.* at 6. Infant gastroenteritis concerns disfunctions of the stomach and intestines usually causing diarrhea and vomiting. *See* CHETLEY, *supra* note 17, at 9; PALMER, *supra* note 3, at 47; FACTS FOR LIFE, *supra* note 17, at 18. "The connection between breastfeeding and diarrheal deaths is well known. The WHO estimates that if all infants were breastfed exclusively to four months of age the Infant Mortality rates would drop by 10%." THE PASSPORT TO LIFE, *supra* note 17, at xx-xxi.

26. PALMER, *supra* note 17, at 46; THE PASSPORT TO LIFE, *supra* note 17, at 29-33.

inadequate sanitation, such immunological protection is imperative to the infant's health.[27] In addition, breastfeeding creates physical and emotional bonding which benefits both the child and mother.[28] The mother also benefits from breastfeeding as it quickens her recovery from the trauma of childbirth[29] and helps prevent another pregnancy, particularly in the first six months following the birth.[30] In countries where prophylactic measures are haphazard, ineffective or nonexistent, this form of natural birth-spacing is essential.[31]

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27. Solomon, *supra* note 2.

28. According to Anward Fazal, Regional Director for Asia and the Pacific, few people can deny that breastfeeding fulfills both physical and emotional needs of the infant. It is as necessary to the baby's development as is optimal nutrition. ALLAIN & CHETLEY, *supra* note 21, at 4, quoting Anward Fazal, Regional Director for Asia and the Pacific, International Organization of Consumers Union, Penang, Malaysia. Furthermore, the natural bond that develops between mother and child secures a supportive start in life for the newborn. CHETLEY, *supra* note 17, at 9, PALMER, *supra* note 17, at 54-59. *See*, Note, *Spilled "Milk,"* *supra* note 11 at 107, n.28.

A study in Brazil showed a reduction in the number of abandoned babies when breastfeeding rates increased, validating the effects of this mother-infant bond. PALMER, *supra* note 17, at 56.

29. Physically, breastfeeding helps speed up the recovery of the mother because sucking releases hormones which induce the mother's uterus to contract and return to normal size. Babies Before Profits, *supra* note 16, at 1.

30. The less protection a mother has against pregnancy, the more likely she is to bear another child. The cessation of breastfeeding, while it helps the mother's body return to a regular ovulation cycle, increases her fertility, and thus the woman is able to bear another child more readily. This cycle is profitable for infant formula producers in that as more infants are born, more infants can be put on the formula. B. Gombony, Nestle's Corporate Strategy and Infant Formula in Brazil, 21 (Spr. 1987) (Master of Arts Thesis, Cal. State Univ., Sacramento) [hereinafter Thesis.]

As a means of natural birth control, studies have shown that, worldwide, breastfeeding has prevented more births than all other forms of contraception combined. PALMER, *supra* note 3, at 72. Breastfeeding can help birth-spacing and prolong the onset of ovulation for up to two years. This is not, as Westerners may think, an old wives tale. The cessation of the menstrual cycle may continue for up to two years among lactating women. Report by WHO Director-General, Infant and Young Child Nutrition, EB 85/18, (Dec. 8, 1989) at 9-10 [hereinafter Infant and Young Child Nutrition]. "Studies show that the return of menstruation and fertility occurs much more rapidly among women in developed countries than among women from the poorer segments of developing countries. This is attributable to differences in breast-feeding practices, full, on-demand breast-feeding being more closely associated with longer periods of lactational amenorrhoea and infertility than are supplemented and scheduled breast-feeding." *Id.* at 10. *See* figure I: Relationship Between Lactational Amenorrhoea and Birth Interval in Jordan, Mexico, Zaire, Philippines, and India, and figure 2: Median Duration of Breast-feeding and Postpartum Amenorrhoea at 9, 10; THE PASSPORT TO LIFE, *supra* note 17, at 48-55; CHETLEY, *supra* note 17, at 9; Note, *Spilled "Milk,"* *supra* note 11, at 107, n.29. *See also* LAWRENCE, *supra* note 4, at 450-57 (explaining that breastfeeding affords contraception protection particularly during the first three months of lactation).

31. One study in Taiwan showed that lactation prevented 20% of births that would have occurred if the mother had not been breastfeeding. Thesis, *supra* note 30, at 21.

Although breastmilk is the optimal infant food, manufactured formula is also nutritious and desireable under controlled conditions.[32] Babies with certain medical problems require formula to replace or supplement their diets.[33] Severely underweight infants, regardless of a mother's ability to breastfeed, may require bottle feeding[34] to promote adequate weight gain.[35] Additionally, all infants physically separated from their mothers require special feeding, and often the caregiver opts for infant formula.[36]

Perhaps the most compelling reason for choosing formula over breastmilk is that women believe formula is more convenient and easier to use.[37] For some, lactating may be uncomfortable[38] and

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32. Solomon, *supra* note 2. *See* Note, *International Labeling Requirements for the Export of Hazardous Chemicals: A Developing Nation's Perspective*, 19 L. & POL'Y IN INT'L BUS. 811 (1987) (quoting T. BREWER, K. DAVID, L. LIM & R. CORREDERA, INVESTING IN DEVELOPING COUNTRIES [hereinafter Note, *International Labeling*]. Infant formula is usually composed of a milk base with vegetable fat, milk, sugar, vitamins and minerals. The formula is based on skim or whole cow's milk which is modified by diluting the base with water to reduce the levels of fat and protein which infants have difficulty digesting. Then, a milk sugar (lactose) is added along with a combination of vitamins and minerals. Finally, a blend of easily digestible vegetable oils is used to restore the needed fat. Solomon, *supra* note 2.

33. Infants with sucking difficulties may require bottle-feeding because more effort is necessary on the part of the infant to extract milk from the breast than is needed to suck from the feeding bottle. *See* FACTS FOR LIFE, *supra* note 17, at 20; *infra* note 35. In addition, some babies may suffer from rare metabolic disorders, making them unable to safely ingest breastmilk. Nestle, Backgrounder: The Infant Formula Issue (Apr. 1988) (informational sheet) [hereinafter Backgrounder].

34. PALMER, *supra* note 17, at 48-49. Breastmilk may be expressed by hand or by pump and put into a bottle for infant feeding. Supplemental Feeding, Ross Laboratories, 5 (Apr. 1988). Babies who must be fed by bottle do not necessarily need to have formula. *See* THE PASSPORT TO LIFE, *supra* note 17, at 67 (formula feeding should be avoided even when the infant is underweight).

35. Although formula and breastmilk are comparable in fat content, the effort expended by the baby to suck the breast is greater than that needed to extract from the bottle. A small, weak baby may lose needed calories as he/she does not have the strength to continue breastfeeding. The baby may therefore gain weight by bottlefeeding rather than breastfeeding. Although breastmilk could be given to the baby by bottle, many women in such situations feel it is the formula, not the fact that the baby is nursing from the bottle that increases weight gain, and these women will formula feed their infants. Telephone interview with Deborah Acshwanden, Pediatric Nurse Practitioner, Sacramento, CA. (Mar. 23, 1990).

36. Backgrounder, *supra* note 33. Another alternative to formula-feeding is bottle-feeding the newborn with pumped breastmilk obtained from the mother beforehand or from a milk bank. *See* LAWRENCE, *supra* note 4, at 468-91.

37. When birthrates skyrocketed after World War II, Western women hailed the bottle as a scientific method liberating them from the home. Solomon, *supra* note 2.

impractical, especially if the mother is engaged in activities outside the home.[39] When the woman's employment separates her from her infant, the bottle is a viable alternative to returning home at regular intervals to feed the baby.[40] Furthermore, a bottle-feeding mother can enjoy participating in activities with her infant outside the home environment without anxiety over exposing her body to the public eye.[41] This is especially true for Western women whose cultures and environments have consistently advocated the covering of the female breast in public areas.

This need for convenience is heightened as more low-economic rural women are driven to urban areas in search of employment.[42] Convenience of use, coupled with the availability of the infant formula product in cities, has led to a consistent decline in breastfeeding practices in urban areas as compared with the countryside.[43] In Nigeria, for example, the percentage of exclusively breastfed infants at one month of age varies between

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38. Breastfeeding may make the woman physically uncomfortable since the breasts swell and leak milk. Her nipples may become sore from her baby's sucking, especially if the infant is not properly positioned. As the milk builds up and is not expelled, the woman may experience extreme discomfort. *See* FACTS FOR LIFE, *supra* note 23, at 18-21.

39. In the United States, the National Fertility Survey in 1965 showed that 68% of mothers born between 1911 and 1915 breastfed their first baby, compared with 35% of mothers born in the early 1940s. Solomon, *supra* note 2. The Western influence soon spread to the Third World. In Brazil, 96% of babies were breastfed at one month of age in 1940, and 39% by 1974. Infant and Young Child Nutrition, *supra* note 30, at 4-8.

40. Note, *Spilled "Milk,"* *supra* note 11, at 108.

41. *See* PALMER, *supra* note 3, at 2-3 (discussing problems with suckling a baby in daily public life.) *See also* 1 Worldview 4 (Fall 1989) (published by Nestle Information Service) (discussing shortened breastfeeding time for busy mothers) [hereinafter Worldview].

42. Worldview, *supra* note 41.

43. Recent studies show in the Region of the Americas, for example, at 12 months of age approximately 50% of infants are breastfed in the rural areas, while in the urban areas the proportion is only 16%. Other studies show in Jordan, Pakistan, and Yemen only 10% of urban infants are fully breastfed, the decline in Pakistan of infants breastfed fell from 95% in 1975 to 86% in 1986. Infant and Young Child Nutrition, *supra* note 30, at 4-7. The duration of breastfeeding is also lowest among urban women, 9.7 months as compared with 12 months for rural women. "Available data (worldwide) indicate that the national average of infants still breastfed at 12 months ranges between 55% and 85%, with internal differences according to the degree of urbanization and socioeconomic position." *Id.* at 4-8.

68% in one rural village to less than 1% among the urban elite of the city of Ibadan.[44]

Although most infants can safely enjoy infant formula properly prepared by the caregiver, some health problems may be compounded by the use of the formula product itself. For example, the protein components contained in the product may cause serious allergic reactions, including diarrhea, vomiting, abdominal pains, and skin rashes.[45] Regardless of the extent to which technology has advanced, exact reproduction of the natural components of breastmilk has yet to be achieved.[46] As one prominent medical professor opined, "[t]o think that in 40 years we can duplicate what has happened in four million years of human development is very arrogant."[47] Overwhelming evidence shows that for the baby, absent poor health or specialized dietary need, breastmilk is superior to formula. Third World women who opt for the convenience of artificial baby formula must do so with caution. Without proper preparation and safe feeding practices, infant formula becomes a dangerous product.

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44. *Id.* at 4

45. Infants who have a mother, father, or sibling with an allergy of any type, have at least a 20% chance of developing allergies. Appleson, *Carnation Introduces Formula For Babies Allergic To Milk*, Reuter Bus. Rep. (June 27, 1988). Because of this, many infant formula companies have developed products that are less likely to provoke allergic reactions. Carnation, acquired by Nestle S.A. in 1984, has developed a product based on whey which is more easily tolerated than lactose. It is estimated that domestic sales in the United States in 1988 for non-allergic infant formula sales approached $350 million. N.Y. Times, June 30, 1988, at D8, col. 3. *See infra* note 117.

46. The composition of breastmilk changes from breast to breast and from feeding to feeding, depending on the biological make-up of the mother and the nutritional needs of the baby. For example, the quality of the milk will change depending on the strength of the baby's sucking and how hungry or thirsty the infant is. Therefore, the composition of breastmilk can never be truly duplicated. Telephone interview with Dr. Nancy Powers, Pediatrician at Wellstart, Dec. 3, 1989. *See also* Note, *Spilled "Milk,"* *supra* note 11, at 107 n.25.

Formula also lacks some of the nutrients of human milk such as iodine and taurine. Taurine may be involved with the development of the brain. Solomon, *supra* note 2.

47. Solomon, *supra* note 2 (quoting Dr. Gerald Gaull, Professor of Pediatrics at Mt. Sinai School of Medicine in N.Y.).

B. The Danger of Marketing Infant Formula in Developing Countries

The Third World suffers from a plethora of problems, including poverty, illiteracy, and unsanitary conditions, all contributing to improper use of infant formula.[48] These conditions make the Third World uniquely susceptible to marketing strategies of infant formula manufacturers which exacerbate the potential dangers of formula.[49] As more women shift from breastfeeding to infant formula feeding and more infants have died, the media has disparaged manufacturers for failing to gear the product to a developing society.[50] These manufacturers refuse to acknowledge responsibility for improper use,[51] admonishing the Third World mother herself as responsible for the harm to her infant, due in part to her disregard of basic rules of hygiene.[52] The infant formula controversy over the role and degree of responsibility persists to date in the arena of Third World poverty.

1. Internal Problems with Product Use

When infant formula is marketed in developing states, the target population is to some extent, the poor. Poverty manifests itself in various ways: financial inability to purchase necessities, inability to maintain an environment free from contamination, and lack of educational sophistication and awareness that might otherwise enable the populace to make informed choices.[53] Poverty acts as

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48. *See* ALLAIN & CHETLEY, *supra* note 21, at 5.

49. *See* POST & BAER, *supra* note 3, at 54 (citing POST & BAER, *Demarketing Infant Formula: Consumer Products in the Developing World*, J. CONTEMP. BUS. 4, 7 (Fall 1978)).

50. Note, *International Labeling*, *supra* note 32, at 822-24.

51. POST & BAER, *supra* note 3, at 54. Companies argue that they are not responsible for conditions of poverty, and that their intentions are only to sell to people who need, can afford, and understand how to use their product. *Id.*

52. Note, *International Labeling*, *supra* note 32, at 822 (quoting managing director of Nestle Alimentana S.A. at press conference).

53. For a general discussion of the problems inherent with Third World use of formula, see *supra* note 11 and accompanying text.

an umbrella of destitution in the Third World, making infant formula ill-suited to the needs of both mother and child.

Providing sufficient formula for the baby is often an impossible task as few people in developing countries can afford to buy adequate amounts of formula; one day's feeding could cost over half the average daily wage.[54] In addition, research shows that feeding a mother well is less expensive than buying sufficient milk for her baby.[55] Furthermore, as destitute families can afford neither electricity nor appliances, formula is often stored unrefrigerated creating a dangerous breeding environment for bacteria.[56] In the interests of budgeting finances as well as ensuring the nutritional health of both mother and child, breastmilk substitutes are inferior to breastmilk.[57]

Lack of sanitary conditions is another major obstacle to successful formula use.[58] Contaminated water presents myriad health dangers[59] to the infant who may be ingesting bacteria through formula tainted with the local water as well as through fetid feeding instruments.[60] One example of extensive water pollution is found in Indonesia.[61] Researchers there uncovered gross contamination by fecal organisms in the water supply, and

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54. Solomon, *supra* note 2; Note, *Spilled "Milk," supra* note 11, at 110. In 1972, 49% of Brazil's population was living in absolute poverty. Purchasing sufficient formula for one infant would cost a family over one third of a fully employed worker's income. Thesis at 81. In Egypt and Pakistan, formula feeding a three-month old infant costs over 40% of an adult's minimum wage. *Id.* at n.49. *See* POST & BAER, *supra* note 3, at 53; Note, *Formulating Customary International Law, supra* note 5, at 397-80, n.23.

55. Babies Before Profits, *supra* note 16, at 1; Note, *Spilled "Milk," supra* note 11, at 107-08, n.30. *See* POST & BAER, *supra* note 3, at 53.

56. Note, *Spilled "Milk," supra* note 11, at 109-10. Overall, more than 46% of Brazilian families lack electricity; this percentage falls to only 11% in rural areas. *Id.* n.46.

57. *See* Babies Before Profits, *supra* note 16, at 1; Note, *Spilled "Milk," supra* note 11, at 107-08, n.30, 110, n.53.

58. Solomon, *supra* note 2; Note, *Formulating Customary Int'l Law, supra* note 11, at 379, n.23.

59. For example, in communities without clean drinking water, a baby who is bottlefed is 25 times more likely to die from diarrhea than an infant fed exclusively by breast. Facts For Life, *supra* note 17, at 20.

60. *See* Note, *Formulating Customary International Law, supra* note 5, at 380, n.23; *see also* Note, *Spilled "Milk," supra* note 11, at 109; Solomon, *supra* note 2.

61. One 1978 study found only 10% of all the families in Indonesia had access to clean drinking water. Note, *Spilled "Milk," supra* note 11, at 109, n.43.

concluded that bottle-fed babies throughout the country should be classified as "high risk."[62] Not only is the water often unclean, but it is an arduous task to make this water safe.[63] Few destitute mothers can continually expend the extraordinary effort required to prepare clean water for each formula feeding, so the product is often ultimately mixed with contaminated water.[64]

Dilution of formula is yet another problem in the Third World.[65] Caregivers believe that if more water is added to the formula, the infant can be nourished longer on the same amount of product.[66] Unfortunately, excessive dilution affects the nutritional balance of baby formula, making it nutritionally inadequate.[67] In a study of mothers at four health clinics in Indonesia, medical research showed "[o]nly one in four women had mixed the milk reasonably close to its recommended strength, despite their above average economic and educational status and the clear directions on

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62. Solomon, *supra* note 2. Studies concluding poor conditions and bottle-feeding lead to infant mortality are plentiful. One leading world health expert in pediatric nutrition, Dr. Derrick Jelliff, estimates that improper bottle-feeding has caused over 10 million cases of infant malnutrition and infectious disease. POST & BAER, *supra* note 3, at 53. In Bangladesh, research shows that most children put on bottles die because filthy conditions in which feeding occurs create dangerous feeding problems. Reinhold, *Furor Over Baby Formulas: When, Where and How*, N.Y. Times, May 24, 1981, at 9, col. 1. In Brazil, a study at Sao Paulo School of Medicine found 23% of bottle-fed babies in the city slums were hospitalized, as opposed to only 9% of those breastfed. *Id.* In the mid-1970s a study by the Chief of Pediatrics of the government hospital in the Philippines showed that in a study of 10,000 babies at Montemayor Hospital, of the 98 infants with infections, 88 were bottle-fed, 7 were mixed fed. Of the 67 babies who died, 64 were formula fed and one mixed fed. Dr. Clavano also reported a 90% drop in the incidence of death among newborns after an overhaul of the infant feeding policy. Babies Before Profits, *supra* note 16, at 3.

63. In Third World countries the communal watersource may contain the only drinking water. Especially in rural or jungle areas, this source may be used as a laundry, bathroom, and toilet. Solomon, *supra* note 2 (quoting Fatima Patel, nurse working with Peruvian Indians in the Amazon.) To get the fuel to boil that water and sterilize it requires an extraordinary effort: the mother must find a tree, chop the wood with whatever primitive tools are available, and build a fire. Often firewood is unavailable. *Id.* "The studies are conclusive. Failure to breast-feed in rural developing communities is tantamount to a death sentence." *Id.* (quoting Dr. Nevin Scrimshaw, director of the MIT Harvard International Food and Nutrition Program).

Both rural and city areas offer an impoverished newborn inadequate protection against bacteria and disease. Worldview, *supra* note 41. Studies show urban slums, often without adequate waste disposal, have even worse contamination problems than those in the countryside. *Id.*

64. Solomon, *supra* note 2 (quoting Fatima Patel, nurse working with Peruvian Indians in the Amazon).

65. *Id.*; Note, *Spilled "Milk,"* *supra* note 11, at 110.

66. Solomon, *supra* note 2; Note, *Spilled "Milk,"* *supra* note 11, at 110.

67. Worldview, *supra* note 41.

the cans."[68] These research subjects were neither poor nor illiterate, yet they too were endangering their infants through product misuse. Why these women would not comply with product directions remains unclear. The influence of an impoverished environment may retain a pervasive effect even after the woman has achieved financial success.

Illiteracy in the Third World gives rise to caregivers who cannot read the directions on the formula container.[69] As a result, the product is improperly prepared.[70] While attempting to gear their products to the illiterate market, manufacturers have generally castigated the host governments for inadequately educating their people.[71] Regardless of fault, the consumer's inability to read or understand the instructions for use of the product leads to certain misuse.

Problems may also arise when people in the developing world attempt to emulate the woman's role in the "modern" family.[72] Western lifestyle is perceived as more sophisticated than that of the Third World, and the influence of modern customs leads to serious problems.[73] Exposing Third World women to Western families using baby bottles, the media popularizes the use of infant formula by portraying bottle-feeding as a status symbol reflecting affluence and scientific advancement.[74] These women strive to share the

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68. Solomon, *supra* note 2 (referring to a study published in the Journal of Tropical Pediatrics).

69. *Id.*; Note, *Spilled "Milk," supra* note 11, at 110.

70. Solomon, *supra* note 2; Note, *Spilled "Milk," supra* note 11, at 110.

71. Note, *International Labeling, supra* note 32, at 822 (quoting from managing director of Nestle Alimentana S.A. at Press Conference). Manufacturers, although aware of the problem, have argued that they cannot teach the people to read and write. *See* Solomon, *supra* note 2.

72. Note, *Formulating Customary International Law, supra* note 5, at 380 n.23. "Many factors contribute to the shift away from breast feeding including . . . a desire to emulate the West." *Id.* Also, many industrialized cultures view the breast as a central object of sexuality, not a feeding tool. The Western male has an ambivalent attitude towards breastfeeding women; they "have grown up with the cultural value that the breast is a sexual object belonging to them, not their interloping infants." PALMER, *supra* note 3, at 30, (quoting Blachman, *Dancing in the Dark*, 8 BIRTH AND FAMILY J. (Wtr. 1981)). This perception has fostered the view that infant formula is a better way to feed babies.

73. *See* POST & BAER, *supra* note 3, at 53. *See also* Solomon, *supra* note 2.

74. Solomon, *supra* note 2 (quoting Judith Gordon, former researcher at New York City's Bureau of Maternity Services).

perceived luxury of bottle-feeding regardless of whether they understand or accept the responsibility for proper use of infant formula.[75]

Health care workers, as well as mothers fail to understand the health risks involved with formula use.[76] A study of doctors in Manila showed that only 35% understood the physical reflexes[77] that control breastfeeding; 72% thought that babies should not be put on the breast in the first 24 hours after birth.[78] Although studies have that shown visits from formula salespeople would be contrary to the welfare of both child and mother,[79] half the doctors and 75% of the nurses surveyed by an international health organization thought it would be a good idea for representatives of milk companies to visit newly delivered mothers.[80]

The Third World is plagued with inherent environmental conditions that contribute to hazardous formula use. Compounded by the ignorance of mothers and ill-informed medical personnel, problems involving the dangers of misuse of artificial breastmilk persist.[81] Infant formula manufacturers intensify this situation

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75. *See* POST & BAER, *supra* note 3, at 53.

76. *See* PALMER, *supra* note 3, at 181.

77. These reflexes occur when prolactin, the hormone that controls lactation, is released immediately after birth. The maintenance of prolactin depends on the baby's suckling. The other hormone involved is oxytocin which controls the let-down reflex facilitating the flow of milk. *Id.* at 24-28.

78.

> The infant's rooting and sucking reflexes are particularly strong immediately after normal delivery and a mother is usually keen to see and touch her child. Encouraging skin-to-skin contact between mother and infant immediately after birth and permitting the infant to suck at the breast will be beneficial and will help to strengthen initial mother-child bonding and stimulate breast-milk secretion. The infant's movements will also stimulate the release of oxytocin, which facilitates the expulsion of the placenta and uterine contraction during the third stage of labour.

PROTECTING, PROMOTING AND SUPPORTING BREAST-FEEDING, *supra* note 17, at 18.

79. The WHO states "[i]t is thus important that the mother leaves the hospital or clinic clear and confident about what she should do to breastfeed successfully . . . [s]he should be encouraged to feed her infant on demand and not to give it anything other than breastmilk." *Id.* at 23.

80. Muller, *Selling Health or Buying Favor*, 3 NEW SCIENTIST, 265, 267-68 (Feb. 3, 1977) [hereinafter *Selling Health*].

81. Because of the profusion of information now available on proper nutrition in developed countries, breastfeeding is making a remarkable comeback. In the Third World, however, breastfeeding rates are still dropping because medical information is not conveyed rapidly enough. In Canada and the United States, the practice of breastfeeding has increased since the mid-1970s.

> The upward trend in the USA peaked in 1984, with 63% of mothers breast-feeding when leaving [the] hospital. Since then, the percentage has dropped [only] by about 1 point or more a year,

through product promotion aimed at enticing the poor. By purposefully attracting vulnerable consumers, the infant formula MNC participates in the precarious use of infant formula.[82]

2. *Third World Susceptibility to Marketing Strategies*

Financially resourceful, the infant formula MNC can buy advertising[83] and marketing techniques aimed at enticing the mother away from breastfeeding[84] and toward the use of breastmilk substitutes.[85] This advertising deceives Third World consumers into believing that infant formula is better than

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and in 1987 it was 57%.... In general, breast-feeding is increasing more rapidly among whites than among Latin, Asian or black populations.

Infant and Young Child Nutrition, *supra* note 30, at 6. UNICEF attributes the increase in breastfeeding to increased education and awareness of the benefits of breastfeeding. *See id.*

"Although breast feeding prevalence is still higher in developing than in developed countries, it has been rising steadily over the past 30 years in developed countries and falling among the disadvantaged in the developing world.... Should this trend continue in the developing countries, the already high rates of infection, retarded growth and development and mortality and morbidity in infancy and early childhood are likely to increase." *Id.* at 8.

82. The Third World consumer and infant are both vulnerable to MNC marketing strategies. "[I]n view of the vulnerability of infants in the early months of life and the risks involved in inappropriate feeding practices, including the unnecessary and improper use of breastmilk substitutes, marketing of breastmilk substitutes requires special treatment, which makes usual marketing practices unsuitable for these products." WHO Code, *supra* note 10, at Preamble.

83. The use of advertising as a corporate tool is well-known and will be accepted as a "given" for the purposes of this comment. As one commentator expressed: "Advertising deals in open sores... .Fear. Greed. Anger. Hostility. You name the dwarfs and we (the admen) play on every one. We play on all the emotions and on all the problems...." P. GOLD, ADVERTISING POLITICS AND AMERICAN CULTURE, FROM SALESMANSHIP TO THERAPY, 119 (1987).

84. To breastfeed or formula feed is no longer an easy decision for the Third World mother as she is influenced by the lingering heritage of substitute feeding practices. ALLAIN & CHETLEY, *supra* note 21, at 4 (quoting Anward Fazal, Regional Director for Asia and the Pacific, International Organization of Consumers Union, Penang, Malaysia).

85. Note, *Formulating Customary International Law*, *supra* note 5, at 379-80, n.23. In Singapore, television advertisements for Nestle's baby care products are featured using Caucasian babies because "[i]n countries such as Singapore, products from the West are perceived as better than local-made." Yanchinski & Hill, *Nestle vs. J & J; Baby-food Marketer Expands New Nescare Baby Products*, ADVERTISING AGE, 62 (Apr. 20, 1987) (quoting Janet Seah, J. Walter Thompson Co., senior account executive).

Over $200,000 was spent on advertising by the infant formula market leader in Malaysia, despite the country's small size. *Selling Health*, *supra* note 80, at 265-68. In remote shops in Third World countries, promotional displays showing smiling white chubby babies sucking on bottles have induced customers to purchase formula. Reinhold, *Furor Over Baby Formulas: When, Where and How*, N.Y. Times, May 24, 1981, at 9, col. 1.

breastmilk and safe to use in the Third World environment.[86] In a press conference, a Nestle representative stated "[i]t is obvious that the advertising must not contain any false indications leading to possible error."[87] Yet false indications are precisely what Third World mothers rely upon and believe when making formula purchases.[88]

In addition to advertising, MNCs employ marketing strategies for infant formula which permeate the privacy of the hospital setting and encourage the new mother to use formula in place of breastmilk.[89] The mother is directly influenced to favor formula feeding through both her own exposure to formula during her hospital stay and the medical staff's promotion of formula feeding. Moreover, she is indirectly influenced by the medical institution's policy supporting the infant formula manufacturer. Companies induce the health care staff to promote their products by giving fringe benefits and free gifts to the staff members and their families. Formula companies claim that gifts to health workers and institutions demonstrate the manufacturer's support for the medical

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86. *See* W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS, at 1018-26 (5th ed. 1984); Note, *International Labeling*, *supra* note 32, at 824. *See* also POST & BAER, *supra* note 3, at 55.

Saleswomen, dressed as nurses were also used to promote infant formula. These women misrepresented that they were sent by the medical community to promote formula as the scientific new way to feed infants. R. Reinhold, *Ideas & Trends in Summary; Furor Over Baby Formulas: When, Where and How*, N.Y. Times, May 24, 1981, at 9, col. 1.

87. Note, *International Labeling*, *supra* note 32, at 824.

88. *Id.*

89. The range of activities has been diverse:

--direct advertising through radio, television, press, mass-circulation magazines, outdoor billboards and posters, and a host of give-away items (T-shirts, nappies, bibs, apron, feeding bottles, carrier bags) which promote the products;

--providing mothers with booklets, leaflets and brochures which advertise the products as well as giving advice on infant care;

--providing health workers with promotional materials, gifts, lunches, trips and samples for their own infants;

--making samples available for mothers, either directly by having sales representatives, often former nurses, give the samples, or indirectly by leaving them at hospitals and clinics for the medical staff to pass on.

CHETLEY, *supra* note 17, at 11-12, n.36.

profession in general.[90] In the Philippines, for example, MNCs have allegedly bought the confidence of hospital staff through inducements that include funding family vacations for physicians, remodeling medical offices and clinics, and supplying medical equipment for nurseries.[91] For health care professionals and poorly funded institutions, these gifts are too enticing to reject. Consequently, when the manufacturer sends its baby formula to the hospitals, the MNC expects the staff, along with the hospital administrators, to support the use of the product in the feeding of newborns.[92]

Paradoxically, while the health care professionals who support the use of formula are becoming more affluent as a result of fringe benefits provided by the formula companies, persons unable to bear the expense of purchasing formula are ultimately drawn to do so.[93] Medical care professionals have acknowledged that by accepting these fringe benefits they unwittingly contributed to the misconception that bottle-feeding is a viable alternative to breastfeeding.[94] As the Chief of Pediatrics in the Philippines explained, "We allowed the [infant formula] companies to touch the lives of our babies, not because we did not care, but because

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90. *See* Salmon, *Milking Deadly Dollars From the Third World*, BUS. & SOC'Y. REV., 43, 46 (Wtr. 1989) (discussing how the infant formula industry has infiltrated the health care system) [hereinafter *Milking Deadly Dollars*].

91. *Selling Health, supra* note 80, at 266 (quoting Dr. Jesus de la Paz, Filipino obstetrician). Mead Johnson, a U.S. company, is the major supplier of infant milks in the Philippines. Mead Johnson's infant formula product line includes Enfalac, Enfapro, Enfamil, Prosoba. IBFAN/IOCU, State of the Code by Country (rev. May 1989) (unpublished chart).

In Sri Lanka, where advertising of infant foods has been banned since 1979, formula manufacturers continue to promote their products indirectly by hosting parties and funding research and travel to benefit the medical profession. Babies Before Profits, *supra* note 16, at 9.

92. "In general, the[se] allegations suggest a subversion of the medical profession's independence of judgment." T. GLADWIN & I. WALTER, MULTINATIONALS UNDER FIRE, *Lessons in the Management of Conflict* 331 (1980) [hereinafter MULTINATIONALS UNDER FIRE] (citing M. Muller, *Selling Health or Buying Favor?* NEW SCIENTIST 266 (Feb. 3, 1977).

93. *See supra* note 91 and accompanying text (discussing ways mothers are induced to buy formula through marketing practices).

94. Action for Corporate Accountability, The Boycott of Nestle & American Home Products 10 (Spr. 1989) (memorandum prepared by Action discussing the reasons and purpose of the boycott) [hereinafter The Boycott].

we did not consider the consequences of granting such a privilege."[95]

Manufacturers also successfully market infant formula by donating free supplies to hospitals for use by patients,[96] thereby impelling the mother to opt for bottle-feeding over breastfeeding.[97] Hospitals may routinely separate the mother and baby at birth and give the newborn formula which manufacturers have supplied to the institution at no or low cost.[98] From the initial feeding, the infant and mother are introduced to the bottle. In this way, the hospital creates the illusion that formula is preferred by the medical profession and that the milk substitute is necessary for maintaining proper infant health.[99] Upon discharge, the mother may receive a free can of formula and a feeding instrument.[100] When mothers and their bottle-fed infants leave the hospital supplied with formula, the mother has no incentive to return to breastfeeding. Medical research confirms that mothers are far more likely to use infant formula when they receive free samples than when free samples are not supplied.[101]

The technique of giving free samples is not only psychologically effective on the mother, but unlike other product inducements, baby formula sampling can cause the infant to be physiologically

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95. *Id.* (quoting Dr. Natividad Clavano, Chief of Pediatrics, Baguio General Hospital, Philippines).

96. This infant formula controversy involves marketing practices regarding the distribution of free samples as well as free supplies. To retain clarity and consistency, this comment uses the definition of these terms provided in the WHO Code of Breastmilk Substitutes: samples - single or small quantities of a product provided without cost; supplies - quantities of a product provided for use over an extended period, free or at a low price, for social purposes, including those provided to families in need. WHO Code, *supra* note 82, at art. 3. *Compare* these definitions *with* the definition in Universal Code *infra* notes 243-59 and accompanying text.

97. *See* CHETLEY, *supra* note 17, at 11-13; Solomon, *supra* note 2; R. Rachid, J. OF COM., *Governmental Programs May Be Biggest Violator*, Aug. 8, 1989, at 2, col. 1.

98. *See* CHETLEY, *supra* note 17, at 11-13; Solomon, *supra* note 2; R. Rachid, J. OF COM., *Governmental Programs May Be Biggest Violator*, Aug. 8, 1989, *supra* note 97, at 2, col. 1.

99. CHETLEY, *supra* note 17, at 11-13.

100. Solomon, *supra* note 2. *See* also Rachid, *Governmental Programs May Be Biggest Violator*, J. OF COM., Aug. 8, 1989, *supra* note 97, at 2, col. 1.

101. Salmon, *Milking Deadly Dollars*, *supra* note 90, at 44. In one study, of 100 infants who were discharged from the hospital where they had been fed a certain brand of formula, 93 stayed on that same formula, showing the importance of hospital promotion. The Boycott, *supra* note 94, at 6 (quoting an Abbot Laboratories Sales Manual).

dependent on the product as well.[102] This dependency makes the promotional strategy of sampling particularly successful.[103] Once the infant has been put on formula exclusively, the mother's lactation process is disturbed and she will eventually be unable to breastfeed her child.[104] The infant becomes "hooked," often refusing the breast.[105] In this sense, infant formula has an addictive effect comparable to that of a drug.[106] One commentator notes that when the mother and infant are dependent on formula, "the companies' donations stop and profit-making begins."[107]

All too often, Third World women are unaware of the repercussions of formula feeding for both their infants and themselves. MNCs send advertising messages luring the consumer into using their product. Additionally, marketing techniques geared at gaining the confidence and support of the health care system have influenced Third World medical practitioners to assist in this shift away from breastfeeding. When the hospital has already established the infant's feeding habits and the caregiver unknowingly acquiesces, the caregiver's opportunity to make a reasoned decision concerning infant feeding fades. Because of the many dangers involved in formula feeding of Third World infants, formula must be carefully marketed in developing countries to ensure that mothers are aware of the dangers in its use and can make informed choices regarding infant nutrition.

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102. Salmon, *Milking Deadly Dollars*, *supra* note 90, at 44.

103. *Id.*

104. Infant formula "[s]erves as a potent force against the successful initiation and maintenance of lactation by reducing the frequency and strength of sucking by the infant." PROTECTING, PROMOTING AND SUPPORTING BREAST-FEEDING, *supra* note 17, at 22. Depending on the mother's individual body, lactation will totally cease after the baby has stopped sucking. *See id.*

105. *See* MULTINATIONALS UNDER FIRE, *supra* note 92, at 361; Salman, *Milking Deadly Dollars*, *supra* note 90, at 44-45. *See also* CHETLEY, *supra* note 17, at 30-35. By the time the mother has finished her free tin of formula, she may be a confirmed bottlefeeder and her baby, accustomed to an artificial nipple, may rebel at the more demanding task of drawing milk from a breast. *Id.*

106. "The mother's milk can dry up and then the baby is hooked on formula," Solomon, *supra* note 2 (quoting Dr. Carl Taylor, chairman of the Department of International Health at John Hopkins University). *See* Rachid, *Governmental Programs May Be Biggest Violator*, J. OF COM., Aug. 8, 1989, at 2, col. 1.

107. Salmon, *Milking Deadly Dollars*, *supra* note 90, at 45.

II. NESTLE S.A.'S INVOLVEMENT IN THE INFANT FORMULA PROBLEM

A. *Nestle S.A., the MNC*

Nestle S.A. (Nestle) has been the MNC targeted with worldwide opposition for failing to market infant formula conscientiously.[108] As the largest food company in the world,[109] Nestle controls the majority of the infant formula market in developing countries.[110] Throughout many years of providing notable quality products and countless successful marketing campaigns, Nestle has become the

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108. The infant formula controversy concerns the marketing of all major formula manufacturers. Alleged marketing violators include: Wyeth-Ayerst Laboratories (division of American Home Products, Inc.), U.S., Carnation Co. (U.S. subsidiary of Nestle S.A.), Switzerland, Ross Laboratories, Inc. (subsidiary of Abbott Laboratories), U.S., Bristol-Myers International Group's Mead Johnson (subsidiary of Bristol-Myers Co.), U.S., Cow & Gate (British subsidiary of Nutricia Nederland BV), Netherlands, Milupa AG, West Germany, Dumex A/S (subsidiary of Dumex, Ltd.), Denmark, Snow Brand Pillsbury, Inc. (Japanese subsidiary of Pillsbury Co.), U.S., Meiji Milk Products Co., Japan, Boots Cp. PLC, Britain, Lijempf/Kononklijke Wessanen NV, Netherlands, Evenflow Products Co., (subsidiary of Spalding & Evenflow Cos.), U.S., Morinaga Milk Industry Co., Japan, Maeil Dairy Products Co., South Korea, Wander, (subsidiary of Sandoz Ltd.), Switzerland, Manyang Dairy Products Co.), South Korea, Humana AG, West Germany, Reckitt & Coleman PLC, Britain. *Not Only Nestle Violates Code*, J. OF COM., 1989.

Nestle, Abott/Ross, Bristol-Myers and American Home Products/Wyeth control over two-thirds of the world market while the other infant formula MNCs share in percentages of no more than seven percent. CHETLEY, *supra* note 17, at 19.

In an effort to limit the scope of this comment, the focus will be on Nestle.

109. Nestle's international product line of infant formula includes Lactogen, Nan, Guigoz, Bear Brand, Beba, Nidina, Cerelac, and Nestum. IBFAN/IOCU, State of the Code by Country (rev. May 1989) (unpublished chart).

Estimated sales for the company in 1989 were $29 billion. Shearson Lehman Hutton, Overview, at 2. Worldwide, Nestle has over 40% of the total infant formula market. Salmon, *Milking Deadly Dollars*, *supra* note 90, at 47.

The infant formula market is quite lucrative. In 1981, the world market was approximately $2 billion. Solomon, *supra* note 2. In 1983, the market rose to $3.3 billion. CHETLEY, *supra* note 17, at 18. 1988 estimates were at $4 billion. PALMER, *supra* note 3, at 6. With a profit margin of 10%, this means $1 million a day for the manufacturer. *Id.* at 6, n.2. By 1989, estimates were as high as $5-6 billion. Salmon, *Milking Deadly Dollars*, *supra* note 90, at 47.

In the U.S. alone, the infant formula industry is a $1.6 billion market. *See* Solomon, *supra* note 2. The market leaders in the U.S. are Abbott-Ross with 48%, Bristol-Myers with 35%, and American Home Products with 10%. N.Y. Times, June 30, 1988, *supra* note 45, at D8, col. 3.

110. The most recent figures estimate Nestle's share of the market at 60%. Telephone interview with Channing Riggs, Assistant Special Issues Director, Nestle Enterprises, Inc., (Nov. 14, 1989); Hoffman & Slade, *Ideas and Trends: Nestle Yields on Formula Code*, N.Y. Times, Mar. 21, 1982, at 7, col. 1.

most popular food manufacturer in the world[111] -- gaining the support and confidence of consumers worldwide despite occassional problems with its infant food lines.[112] Because Nestle is the leader in the formula industry, competitors look to imitate its marketing strategies. If Nestle's promotional activities were to change, the rest of the infant formula companies would probably follow.[113]

Nestle, the parent company, is incorporated in Switzerland and regulated by Swiss law.[114] A true MNC, 98% of Nestle business is outside the Swiss market.[115] The company designed its corporate structure to be basically immune from outside shareholder attack.[116] Additionally, Nestle's U.S. plants

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111. The Nestle company is most popular for its establishment in the milk industry, but its major food profits stem from drinks 27.5%, dairy products, 14.8%, chocolate and confectionery, 12.4%, culinary products, 12.1%, frozen foods and ice-cream, 10.2%, refrigerated products, 8.8%, infant foods and dietetic products, 5.7%, and petfoods, 4.3%. Nestle sales in Europe account for 46.4% of Nestle's total world-wide sales, North America, 26.3%, Asia 11.9%, Latin America, 10.0%, Africa, 2.9%, and Oceania 2.5%. NESTLE S.A, 1988, ANNUAL REPORT 6 (1989).

112. Nestle has been plagued with problems in its infant food lines. In 1987, Beech-Nut, a wholly-owned Nestle subsidiary since 1979, was found to have knowingly marketed mislabeled and unadulterated apple juice for babies and agreed to pay a $2 million fine (the largest fine in the history of the Food and Drug Administration (F.D.A.)) and $140,000 for Food and Drug Administration investigative costs. ADVERTISING AGE (Sept. 28, 1988). In addition, Beech-Nut executives were sentenced to jail, and prosecutors called the case the most serious admission of criminal wrongdoing by a corporation in the history of the F.D.A. Salmon, *Milking Deadly Dollars*, *supra* note 90, at 47.

113. *See* CHETLEY, *supra* note 17, at 52. *See also* Heneghan, *Babies*, Reuters Ltd., (Mar. 22, 1982).

114. NESTLE ENTERPRISES INC., 1988 ANNUAL REPORT inside cover (1988).

115. Address by R.F. Domeniconi, Executive Vice President, Nestle S.A., U.S. Presentation (June 22, 1989).

116. *See* Berss, *Sleep Well or Eat Well*, FORBES, (Feb. 13, 1984), section Companies, at 62. *See* also MULTINATIONALS UNDER FIRE, *supra* note 92, at 367.

In order to change corporate policy from inside the corporation, shareholders must have enough influence on the Board of Directors to pass influential resolutions. Often the Board will not be touched by irate shareholders' actions. As Americans became more aware of the problem in the Third World infant formula market, shareholders of American companies attempted to pass resolutions compelling the disclosure of sales and marketing strategies in the Third World. None of the resolutions passed, but this technique helped to raise awareness of the problem of the Third World in the U.S. CHETLEY, *supra* note 17, at 52.

"By design, 64% of Nestle stock is held by Swiss citizens, and, like most Swiss companies, Nestle can reject any potential Swiss shareholder it doesn't want." Berss, *Sleep Well or Eat Well*, Forbes, Feb. 13, 1984, section Companies, at 62. In this way Nestle can immunize itself from shareholders it suspects may cause trouble. Recently the company has decided to allow foreign nationals and institutions to purchase registered shares of Nestle, limiting the shareholder or syndicate to a maximum holding of 3% of the total shares on the market. Nestle, Press Release, Nestle S.A.:

manufacture no formula subsequently distributed in the Third World.[117] Therefore, U.S. legislation restricting the production and marketing of infant formula sent to developing nations has no legal or practical effect on the Nestle company.[118] Theoretically, Nestle would be bound by Swiss laws restricting marketing practices, but to date, Switzerland has enacted no formula marketing legislation.

B. *Tracing the Historical Development of Nestle's Problems as a Marketer of Infant Formula*

For more than twenty years, Nestle's promotional practices have proved problematic. In 1968, controversy developed over Nestle's

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Restrictions for Registered Shares Lifted, (Nov. 1988). As a result, bearer bonds which had been available and owned by foreign investors plummeted 20% and shareholders threatened lawsuits over the move. Greenhouse, *Nestle's Time to Swagger*, N.Y. Times, Jan. 1, 1989, at 1, col. 2. Although this opens Nestle up to more diversity and possible American shareholder action, the great restriction on shares will keep the corporation under tight control.

117. Until the acquisition of Carnation in 1985, Nestle S.A. did not have any plants producing formula in the U.S., nor did Nestle sell infant formula within the U.S. Telephone interview with Channing Riggs, Assistant Special Issues Director, Nestle Enterprises, Inc., (Nov. 14, 1989).

Carnation re-entered the U.S. formula market with two new products, Good Start H.A. (partially hydrolyzed whey protein formula reputed to be hypoallergenic for cow's milk sensitive children), and Good Nature (formula for the infant six months and older). After an FDA investigation over the labelling of these products as hypoallergenic, Carnation was forced to remove the word "hypoallergenic" from the front label. Reuter Bus. Rep. Mar. 1989; Reuters Bus. Rep. July 7, 1989; Reuters BC, Mar. 2, 1989; Reuters BC, July 7, 1989; Rothenber, *The Media Business: Advertising; Carnation Halts Formula Claims*, N.Y. Times, July 7, 1989, at 5, col. 3. Controversy also developed in the U.S. over the direct advertising of Carnation formula to mothers. Recently, Carnation has promoted formula through advertisements appearing on mid-afternoon television when mothers are most apt to be home. Carnation has also introduced advertisements through magazine ads and coupons. *See* Howard, *Carnation Hopes Informational Campaign Will Avert Doctor's Ire Over Infant Formula*, 10 L.A. Bus. J. 28 (July 4, 1988); Sun, *Nestle Plans to Push Into Lucrative U.S. Market for Infant Formulas*, L.A. Times, July 10, 1988, at 10, col. 1; Health or Profit, J. OF COM., Action. The American Academy of Pediatrics reiterated its stance concerning advertising: "... the AAP will continue to recommend against any advertising or marketing of infant formula preparations directly to the lay public." Policy Statement by American Academy of Pediatrics, *Follow Up Formula*, AAP NEWS (Oct. 1988), J. Strain, M.D., Executive Director; Policy Statement by American Academy of Pediatrics, *Direct Advertising of Infant Formula to the Public* (June 2, 1989); Policy Statement by American Academy of Pediatrics, *Policy on Direct Advertising to the Public*, Approved by Executive Board (Sept. 21, 1989).

118. Export controls could be enacted in order to restrict a U.S. company, such as American Home Products, Bristol-Myers, or Abbott Ross from marketing outside the U.S., but as of yet the U.S. has taken no action to do so.

mass advertising campaigns to market formula in developing nations. Advertising on billboards and using pictorial images, Nestle created the impression that infant formula was endorsed by the medical profession and was safe and easy to use in the Third World.[119] By 1970, the United Nations had become aware of the problem involving the wide-spread advertising and use of infant formula.[120] The U.N. Protein Calorie Advisory Group (PAG)[121] warned that poverty, unsanitary conditions, and illiteracy could lead to misuse of infant formula. PAG recommended careful regulation and supervision of marketing and use of breastmilk substitutes.[122] By 1974 a definite link between misleading formula promotion and infant mortality was established; however, infant formula marketing remained unregulated.[123] Also in response to the controversy, the World Health Organization urged member nations to review infant formula marketing and introduce restrictive advertisement codes.[124] Church and consumer organizations joined in the debate and publicized the issue, focusing on alleged unethical advertising practices of the Nestle corporation.[125]

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119. Smith, *Let the Buyer Beware*, NEWSDAY, May 14, 1989, at 23.

120. Note, *Innocents Abroad: Infant Food Technology at the Law's Frontier*, 20 VA. J. INT'L L. 617, 631 (1980).

121. Among the international organizations concerned with the study and improvement of worldwide nutrition, one of the more active was PAG, a non-governmental organization under the auspices of the U.N. From the 1960s until its dissolution in 1977, PAG coordinated nutrition, research, and aid programs carried out by U.N. agencies such as the WHO and UNICEF. *See* NESTLE S.A., *The Dilemma of Third World Nutrition: Nestle and the Role of Infant Formula* 4-5 (1982). For a thorough discussion of PAG's activities, see Note, *Innocents Abroad: Infant Food Technology at the Law's Frontier*, 20 VA. J. INT'L L. 617, 634-36 (1980).

122. Sikkink, *Codes of Conduct for Transnational Corporations: The Case of the WHO/UNICEF Code*, 40 INT'L ORGANIZATIONS 815, 821 (1986) [hereinafter Sikkink, *Codes of Conduct*].

123. The World Health Assembly issued a resolution acknowledging the link between the decline in breastfeeding and infant malnutrition and mortality. This resolution stated that the decline in breastfeeding was in part due to the increase in infant formula promotion. Note, *Spilled "Milk,"* *supra* note 11, at 111.

124. Nestle, Nestle's Report on Infant Nutrition (Oct. 1989). *See* Sikkink, *Codes of Conduct*, *supra* note 122, at 821.

125. In 1974, Nestle had 40% of the then existing infant formula market in Third World countries. Sikkink, *Codes of Conduct*, *supra* note 122, at 821.

The formula controversy was internationally publicized in 1974 when a little known British charity published "The Baby Killers," a pamphlet expressly citing Nestle as promoting the infant product in the Third World through harmful promotional practices. Nestle did not initially react to the publication but when the Third World Action Group (TWAG), a Swiss NGO made up of clergy,

Although Nestle denied any marketing malpractice, the rising controversy concerned the industry. In 1975, realizing the need to address the issue,[126] nine infant formula manufacturers met in Switzerland and established the International Council on Infant Formula Industries.[127] The purpose of the group was to develop a manufacturer's code of ethics, emphasizing the use of care and responsibility in the marketing of infant formula.[128] Unfortunately, the organization refused to admit any responsibility on the part of the industry for marketing abuse. The manufacturer's code that was ultimately passed was virtually useless, containing few, if any, new restrictions for the industry.[129]

In 1977, after Nestle had continually refused to comply with requests from active consumer groups to curb its marketing practices,[130] the Infant Formula Action Coalition (INFACT)[131] announced the inception of an international boycott against the

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teachers, and students, translated the pamphlet into German, renamed it "Nestle Kills Babies" and added an introduction exposing Nestle as the major malefactor in the controversy, Nestle responded. Nestle sued TWAG in Switzerland for libel and defamation. Note, *Spilled "Milk," supra* note 11, at 111; MULTINATIONALS UNDER FIRE, *supra* note 92, at 362. Nestle maintained that its promotional practices were moral and ethical, and claimed they "could not be held accountable for conditions of poverty or illiteracy that might lead to abuse of its products." *Id.* TWAG's purpose in publishing the pamphlet was to expose "the problem arising from the introduction of Western consumption into developing countries." *Id.* at 363. With Nestle dropping three of the four counts against TWAG, Nestle ultimately won the suit but not without an admonishment from the judge that Nestle "reconsider its advertising policies if it wants to avoid being accused of immoral conduct." *Id.* The trial publicity brought international scorn upon Nestle for its marketing practices. *Id.* at 362-63; Sikkink, *Codes of Conduct, supra* note 122, at 821; Note, *Spilled "Milk," supra* note 11, at 111.

126. MULTINATIONALS UNDER FIRE, *supra* note 92, at 364; Note, *Spilled "Milk," supra* note 11, at 112.

127. MULTINATIONALS UNDER FIRE, *supra* note 92, at 364.

128. In 1980, members of the organization included: BSN GervaisDanor, SA (France), Coop Condersfabrick Friesland (Netherlands), Cow & Gate (England), Dumex, Ltd. (Denmark), Lijempf BV (Netherlands), Meiji (Japan), Moringa (Japan), Nestle (Switzerland), Nutricia (Netherlands), Snow Brand (Japan), Wakado (Japan), and Wyeth (United States). Nutricia resigned to protest the organization's lobbying against the implementation of the WHO Code 1984. Note, *Spilled "Milk," supra* note 11, at 112, n.68.

129. Thesis, *supra* note 30, at 25. Nestle allegedly dominated, and insisted on mass media advertising. MULTINATIONALS UNDER FIRE, *supra* note 92, at 364.

130. MULTINATIONALS UNDER FIRE, *supra* note 92, at 368.

131. INFACT was an American non-governmental organization under the leadership of the Third World Institute at the University of Minnesota. Working closely with church groups, INFACT played a major role in bringing attention to the infant formula conflict. *Id.* at 366.

Nestle corporation.[132] INFACT urged people of all nations to refuse to buy Nestle products[133] until the company agreed to stop all promotion of infant formula including all direct advertising to consumers, the distribution of free samples, the use of company "milk nurses,"[134] and promotion of the product to health workers.[135] The boycott continued and gained the support of church organizations, health workers, celebrities and prominent politicians.[136] The activities of non-governmental organizations (NGOs) brought attention to the particular marketing and advertising ploys used by MNCs in the Third World, and the leading formula producers experienced the repercussions of such negative publicity. As a result, in 1978 Nestle declared that it was planning to stop mass media advertising of infant formula in developing countries.[137] In the hope of resolving the conflict, industry representatives agreed to take an international approach and requested a meeting of the World Health Organization.[138]

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132. *Id.* at 368. The International Nestle Boycott Committee was the group designated to lead the boycott against Nestle in 1979. CHETLEY, *supra* note 17, at 123. Despite the negative press surrounding the boycott, Nestle did not suffer from a loss of sales in developing countries during this time. This was due to the fact that birth rates remained high in these countries and Nestle's reputation for producing safe products prevailed. Furthermore, the boycott was never declared in the Third World. *See* Thesis, *supra* note 30, at 33.

133. The countries where the boycott was declared included: The United States, Canada, Australia, the United Kingdom, Sweden, New Zealand, France, Norway, Finland, and West Germany. Thesis, *supra* note 30, at 33.

134. "Milk nurses" were infant formula company representatives dressed as nurses representing the health care field and endorsing the use of formula. *See supra* note 86 (discussing formula representatives dressed as nurses).

135. CHETLEY, *supra* note 17, at 52-54.

136. CHETLEY, *supra* note 17, at 53. Senator J.H. Chaffe at a Senate hearing in 1978 told Oswardo Ballarin, president of Nestle Brazil, that he believed a boycott against U.S. Nestle operations "was the best way of getting at the Swiss parent company." *Id.* at 54.

Boycotting Americans not only wrote Nestle, but also asked that their representatives in Congress get involved in the issue of promotion of infant formula in the developing nations. In response to the volume of mail received, Senator Edward Kennedy (D-Mass.), Chairman of the U.S. Senate Subcommittee on Health and Scientific Research, held hearings investigating the marketing and promotion of infant formula in the Third World. The Committee concluded that an international solution to an international problem was required. *Id.* at 57; Sikkink, *Codes of Conduct, supra* note 122, at 822.

137. Nestle, *Nestle's Report on Infant Nutrition*, Oct. 1989, *supra* note 124.

138. Sikkink, *Codes of Conduct, supra* note 122, at 822.

III. THE WORLD HEALTH ORGANIZATION AND THE WORLD HEALTH ASSEMBLY ACTION

A. *WHO and WHA*

The World Health Organization (WHO) was created in 1948 to bring together the health professionals of 165 countries.[139] Operating under the auspices of the United Nations (U.N.), the Organization creates a cooperative forum in which member nations promote the highest standards for world health.[140] Activities of the WHO include developing systems of primary health care, promoting the health of mothers and children, combating malnutrition, promoting mass immunization against preventable diseases, improving mental health care, providing safe water

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139. All U.N. member countries may become members of the WHO by accepting its Constitution. Members according to regional distribution are: Africa: Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Cote d'Ivoir, Equitorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, South Africa, Swaziland, Togo, Uganda, United Republic of Tanzania, Zaire, Zimbabwe, Nambia (Associate Member); Americas: Antigua and Barbuda, Argentina, Bahamas, Barbados, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts, and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States of America, Uruguay, Venezuela; South-East Asia: Bangladesh, Bhutan, Dem People's Republic of Korea, India, Indonesia, Maldives, Mongolia, Nepal, Sri Lanka, Thailand; Europe: Albania, Austria, Belgium, Bulgaria, Byelorussian SSR, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Luxembourg, Malta, Monaco, Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, Ukrainian SSR, Union of Soviet Socialist Republic, United Kingdom of Great Britain and Northern Ireland, Yugoslavia, Non Member States: Holy See, Liechtenstein; Eastern Mediterranean: Afghanistan, Bahrain, Cyprus, Democratic Yemen, Djibouti, Egypt, Iran (Islamic Republic of), Iraq, Jordan, Kuwait, Lebanon, Libyan Arab Jamahiriya, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syrian Arab Republic, Tunisia, United Arab Emeritus, Yemen, Western Pacific: Australia, Brunai Darussalam, China, Cook Islands, Dem Dampuchea, Fiji, Japan, Kiribati, Lao People's Dem Rep, Malaysia, New Zealand, Papua New Guinea, Philippines, Republic of Korea, Samoa, Singapore, Solomon Islands, Tonga, Vanuatu, Viet Nam. 1988 Y.B. INT'L. ORG. (Union Int'l Ass'n). As of November 1990, representatives at the U.N. indicated there were 160 members.

140. The goal of the Organization is to attain a high level of health for the citizens of the world by the year 2000. PROTECTING, PROMOTING AND SUPPORTING BREAST-FEEDING, *supra* note 17, at inside cover. World Health Organization Constitution, effective Oct. 25, 1960, Objective, Ch. 1, Art. 1, *reprinted in* 2 A COMPREHENSIVE HANDBOOK OF THE UNITED NATIONS 96 [hereinafter HANDBOOK].

supplies, and training health personnel.[141] The WHO also disseminates health statistics, and establishes and administers international health regulations.[142]

The World Health Assembly (WHA) meets annually to discuss actions necessary for the implementation of WHO objectives.[143] The Assembly establishes WHO policies and programs and adopts international codes through conventions and regulations.[144] Whereas these international codes have some moral and practical effects, they have no legal force without the enactment of the member nation's legislation.[145] A convention or regulation will become binding only when it is ratified through the states' own legislative process.

WHA may also make recommendations to member states regarding any matter within the scope of the Organization, but recommendations are merely advisory.[146] Although not legally binding, recommendations exert limited influence as the collective

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141. PROTECTING, PROMOTING AND SUPPORTING BREAST-FEEDING, *supra* note 17, at inside cover.

142. *Id.*

143. The WHA determines the policies of the Organization, establishes committees, considers reports from organizations, conducts research, establishes institutions and takes any other appropriate action in furtherance of the objectives of the WHO. WHO Constitution, Article 18, *reprinted in* HANDBOOK, *supra* note 140, at 99-100.

144. *Id.*

145. *See* Magraw, *Document III-B United Nations ECOSOC Draft Code of Conduct on Transnational Corporations*, Int'l Economic Law Documents (1989) (discussing codes restricting MNC behavior).

146. The WHO is open to all countries accepting the WHO Constitution; it is not restricted to U.N. members. The WHA is composed of delegates representing members of the WHO. These delegates vote on the adoption of conventions and regulations, as well as recommendations. HANDBOOK, *supra* note 140, at 98-105.

With conventions, each state submits the adopted agreements to its constitutional processes within eighteen months of adoption. CHETLEY, *supra* note 17, at 80. To become adopted, a convention would require a two-thirds majority of the WHA and each member state would then need to ratified the convention within eighteen months. *Id.* Likewise, regulations adopted by the Assembly can be binding or not, depending on whether the state adopts the regulation or rejects it within a specified time frame. HANDBOOK, *supra* note 140 at 100, WHO Constitution, at art. 22. A regulation, requiring a simple majority of the WHA would come into force usually within a 12 month period and would allow nations to opt out. CHETLEY, *supra* note 17, at 80. The weakest method of passing a Code is as a recommendation. Recommendations are approved by only a simple majority or consensus agreement of the WHA. *Id.* With no time limit or necessity for states to act, each member state individually decides to pass legislation supporting the recommendation. *Id.*

ideas and agreements from all the member states.[147] Albeit informative and somewhat morally obligating, recommendations lack the status of conventions or regulations. Oftentimes recommendations are used as a model upon which countries devise their own laws, but WHO recommendations are in no way enforceable unless adopted as national legislation.[148]

B. Action Taken by WHO in Response to the Infant Formula Problem

Poignantly appropriate, 1979 marked not only the International Year of the Child, but also prominent intervention in the infant formula controversy. Through the United Nations Children's Fund (UNICEF)[149] and WHO conferences, the U.N. organized and supported an international forum in which the infant health and breastmilk substitute problem was discussed.[150] The forum participants recognized that a regulatory code was necessary to control inappropriate marketing practices[151] of infant formula suppliers.[152] After rejecting four preliminary drafts,[153] the World Health Assembly considered in final form, The International Code of Marketing of Breastmilk Substitutes.[154]

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147. *See* CHETLEY, *supra* note 17, at 75-86.

148. *See* HANDBOOK, *supra* note 140, at 100 (reprinting WHO Constitution at art. 23).

149. The United Nations Children's Fund, formerly the United Nations International Children's Emergency Fund, was established in 1946 by the United Nations General Assembly to aid governments in their efforts to promote programs benefiting children and protecting their rights. UNICEF works with the governments of 118 developing countries to help protect children from disease and malnutrition, and to prepare them for a healthy productive adulthood. UNICEF provides health assistance, family planning, educational activities, nutritional programs, as well as food and supplies for basic children's needs. 1988 Y.B. INT'L. ORG. (Union Int'l Ass'n.) 895.

150. These conferences were held in Geneva and consisted of representatives from government, international organizations, individual executives, health experts, non-governmental organizations, and consumer activists. Sikkink, *Codes of Conduct*, *supra* note 122, at 822.

151. For example, there had been allegations that Mead Johnson dumped expired infant formula into the market. Babies Before Profits, *supra* note 16, at 2.

152. ALLAIN & CHETLEY, *supra* note 21, at 11.

153. Telephone interview with Janice Mantell, Executive Director, Action for Corporate Accountability (Nov. 14, 1989). Ms. Mantell explained that the original drafts included recommended sanctions against the manufacturers. The sanctions were rejected in the final version because of fear that such strong provisions would inhibit the likelihood of the Code's passing. *Id.*

154. WHO Code, *supra* note 10.

On May 21, 1981, the 34th World Health Assembly adopted as a recommendation,[155] the WHO International Code of Marketing of Breastmilk Substitutes (WHO Code or Code).[156] With three abstentions, the Assembly vote was 118 in favor, and one nation, the United States, opposed.[157] The lone dissenting vote brought international and national ridicule upon the U.S. government for allegedly succumbing to lobbyist pressure.[158]

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155. The U.S. had been involved up to the end in drafting the Code. When the first draft of the Code had been prepared by the WHO and UNICEF staffs in 1980, the U.S. warned that "a document with provisions that are mandatory on governments or corporations could not be accepted by the U.S." CHETLEY, *supra* note 17, at 77. At the WHA meeting prior to the vote on the final version of the Code, the U.S. stated that it would be unfortunate if the Code were not passed unanimously and suggested that it not be submitted as a regulation or convention. When the Code was voted on as a recommendation, the U.S. still did not endorse it. *See id.* at 75-99.

156. 34 U.N. WHO Resol. at 1004, U.N. Doc. A34/VR/15 (1981).

157. "The decision to vote against the WHO's Code was taken by the White House, apparently by Mr. Edwin Meese, the President's right hand, after direct representation by industry and over the more cautious advice of lower level bureaucrats in both the State and Health and Human Services Department that the US simply abstain." CHETLEY, *supra* note 17, at 95.

Ernest Lefever, nominated but not appointed by Reagan as Assistant Secretary of State for Human Rights and Humanitarian Affairs, was alleged to have accepted contributions by Nestle. N.Y. Times, June 16, 1981, at 18, col. 4. Lefever allegedly accused the promoters of the Code as having taken part in a plot hatched by the Soviet Bloc. *Id.*

158. Delegates at the WHA found the U.S. position appalling:

> The code is a landmark in the history of health, in particular the health of children, particularly for the developing countries. Today, we believe that this is our minimum duty in adopting this code, in view of the needs of protecting health for children. We therefore wonder why certain countries, particularly in the case of the major powers, are adopting a position against this international code, in order to hamper our work.

CHETLEY, *supra* note 17, at 98-99. Health scientists protested to Secretary of State Haig:

> It is clear that the White House Staff clearly went against the consensus reached within the departments. We also squandered our most precious resource--the example we provide in Third World nations seeking to achieve American standards of health and nutrition and denied the WHO and UNICEF the strongest possible expression of concern about infant health.

Hon. Don Bonker, Chairman, Subcommittee on Human Rights and International Organizations (statements submitted to the Congressional Record).

The U.S. State Department Representative explained the official position against the international Code claiming that the issues in the Code were irrelevant to the U.S. and interfered with the U.S. free-market principles. Furthermore, the representative for the administration explained that there was "undue attention given to the U.S. vote against the Code."

The reaction at home was strong. The administration was criticized for compromising personal standards of government ethics and conflicts of interests. "This decision can only bode ill for future U.S. national interests in international negotiations." Jim Leach, Member Subcommittee on Human Rights. Two U.S. aides from the Agency for International Development in Washington, pediatrician

While the U.S. response disappointed the WHO members, the overwhelming positive response by member nations to enact an infant formula code was the first major step towards safer infant feeding practices. One WHA representative expressed the feeling of the organization in this way:

> It has been recognised that improper marketing of breast-milk substitutes can lead to inappropriate feeding practices resulting in malnutrition, illness and death. We [WHA] strongly believe[s] that it is imperative to make sure that the marketing of these products does not encourage mothers capable of breastfeeding to bottle-feed instead. To this end, an international code for the marketing of breastmilk is an extremely important step.[159]

On the international front, it appeared that an end to the controversy over acceptable marketing strategies of infant formula was forthcoming.

C. *Evaluation of the International Code of Marketing of Breastmilk Substitutes*

The first of its kind, the WHO Code is a detailed and restrictive agreement regulating a specific product.[160] Directed at individual governments, the Code levies no sanctions and serves primarily as a foundation upon which individual nations can enact their own

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Dr. Stephen C. Joseph, the highest ranking medical professional at the agency, and Eugene N. Babb, deputy assistant administrator for food and nutrition, protested the vote by resigning. Brozan, *Two U.S. Aides Resign Over Baby Formula*, N.Y. Times, May 21, 1981.

The White House political staff was criticized by Congress and the health care professionals for clearly disregarding the consensus reached by professional health care experts and diplomatic and foreign affairs advisors. In reaction to the U.S. vote on the WHO Code, the U.S. House of Representatives passed H.R. Res. 287 on June 16, 1981, admitting that infant formula accounts for up to a million deaths in developed and developing countries, and urging the U.S. infant formula industry to abide by the regulations and guidelines. The vote was 301 in favor and 100 opposed. *See* 20 *International Legal Mat.* (1981). Additionally, the U.S. Senate passed Section 118 of the Department of State Authorization Act (amendment 72) on June 18, 1981. This was a much weaker act in support of the WHO guidelines and it failed to include the admission that deaths were a result of infant formula use. *Id.* It did include a passage expressing concern for those mothers who are unable to provide breastmilk, asking that they be protected (implying they should be supplied with infant formula).

159. ALLAIN & CHETLEY, *supra* note 21, at 9 (quoting Professor I. Dogramaci, representative from Turkey at 1981 WHA).

160. Sikkink, *Codes of Conduct*, *supra* note 122, at 821.

legislation in accordance with the Code's principles.[161] These principles include: providing information regarding the superiority of breastfeeding to mothers and health care workers;[162] prohibiting marketing and advertising techniques aimed at promoting infant formula;[163] and ensuring proper labeling for the safe use of the product.[164] The Code also requires governments to monitor the implementation of the Code by working with non-governmental organizations, professional groups, consumer organizations, and manufacturers.[165] Additionally, manufacturers and distributors are held responsible for monitoring their marketing practices in accordance with the aims expressed by the WHA.[166]

D. Problems with the Code

The greatest problem with the WHO Code is that it exists only as a recommendation and is not legally binding or enforceable.[167] Since WHA recommendations do not have any legal force without ratification by individual countries, affected governments have been urged to implement legislation adopting the provisions of the International Code.[168] An additional problem with the Code is the inherent ambiguity of terminology used. Article 6 section 6 provides that only those infants who have to be fed breastmilk substitutes should receive free and low cost supplies.[169] The

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161. WHO Code, *supra* note 82, at art. 11.

162. *Id.* at Preamble, arts. 4; 4.2; 6; 7.

163. *Id.* at arts. 5.4, 5.5, 6.2, 6.6, 6.7, 7.2, 8.

164. *Id.* at arts. 9, 9.2, 9.3, 11.

165. *Id.* at art. 11.

166. *Id.* at art. 11.3. "Independently of any other measures taken for implementation of this Code, manufacturers and distributors . . . should regard themselves responsible for monitoring their marketing practices according to the principles and aim of this Code, and for taking steps to ensure that their conduct at every level conforms to them." *Id.*

167. *See id.* at art. 11.

168. ALLAIN & CHETLEY, *supra* note 21, at 11.

169. Section 6.6. states in part:

> Donations or low-price sales to institutions of supplies of infant formula or other products within the scope of this Code, whether for use in the institutions or for distribution outside them, may be made. Such supplies should only be used for infants who have to be fed on breastmilk substitutes. If supplies are distributed for use outside the institutions, this should be done only by the institutions concerned. Such donations or low-price sales should not be used by manufacturers as a sales

definition of "have to be fed" proved to be the focus of much conflict among infant formula manufacturers, U.N. organizations, and other non-governmental groups. Product manufacturers contended that the definition was broad, including those mothers who would be inconvenienced by breastfeeding, whereas WHA representatives claimed that "have to be fed" covered only infants whose health necessitated formula. Furthermore, the Code allowed for free supplies to be given to "institutions," and whether hospitals were considered institutions became an additional source of contention.[170] Such discrepancies regarding interpretation of the Code eventually led to an international effort through WHA to clarify these terms.

E. 1986 Resolution by WHA

The World Health Assembly enacted the "Supplies Resolution" (Resolution)[171] in 1986. This proclamation, passed as a recommendation with the same legal status as the earlier WHO Code,[172] was designed to resolve the ambiguities found in the original Code provisions. To clarify the terms "have to be fed"[173] and "institutions,"[174] the Resolution urged a cessation of

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inducement.

WHO Code, *supra* note 10, at art. 6.6.

170. "Donations or low-price sales to institutions or organizations of supplies of infant formula or other products within the scope of this code, whether for use in the institutions or for distribution outside them, may be made." *Id.*

171. The vote for WHA 39.28 was 96 in favor, 1 against (U.S.). ALLAIN & CHETLEY, *supra* note 21, at 23. It was adopted in Plenary by consensus. *Id.*

172. *Id.*

173. *See supra* note 169. The Nestle Infant Formula Audit Commission issued a statement that "resolution 39.28 does not attempt to define the term infants who have to be fed on breast-milk substitutes." Nestle Infant Formula Audit Commission, *Report on the Infant Formula Controversy by the Nestle Infant Formula Audit Commission*, at 8 (response to the October 1988 initiation of the second consumer boycott against Nestle products). NIFAC points to an earlier statement from the WHO, made in April 1986 when Guidelines were issued "to help determine which infants have to be fed on breast-milk substitutes." *Id.* at 7. The Guidelines omitted the subsequent WHA Resolution 39.28 statement "maternity wards and hospitals should not be the recipient of free or subsidized supplies of infant formula" and instead said "breast-milk substitutes . . . should be made accessible to those who need them through commercial and non-commercial distribution systems." *Id.* at 7-8. It is to these Guidelines, rather than the WHA Resolution, that Nestle stands committed. "[I]f the WHA had intended to place an independent responsibility upon infant formula manufacturers through

all free or subsidized supplies of breastmilk substitutes to hospitals and maternity wards.[175] The Resolution states in part, "the small amounts of breast-milk substitutes needed for the minority of infants who require them in maternity wards and hospitals are made available through the normal procurement channels and not through free or subsidized supplies."[176] The sponsors of the Resolution explained that they intended to act in accordance with the aim of protecting infant health expressed in the WHO Code.[177] Since free or subsidized supplies of infant formula in hospitals and maternity wards would discourage breastfeeding, WHA representatives asserted that the Resolution could not advocate an interpretation of the Code that would prove harmful to infants by permitting free or subsidized supplies in hospitals or maternity wards.[178] Regarding the ambiguity in the original Code concerning, "institution," WHO Director Dr. Hafden Mahler, stated:

> Institutions and organizations mentioned in Article 6, Paragraph 6 were intended to mean orphanages and similar social welfare agencies. They were not intended to refer to direct health care providers, that is to say health care facilities such as hospitals and maternities, where in most cases infants remain for only a limited period before joining their families at home.[179]

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the Resolution, the WHA could have done so expressly. . . ." *Id.* at 9. Dr. Peter Greaves, Senior Advisor in Nutrition for UNICEF stated that it was obvious what was intended, and that WHA 39.28, if it were to be followed, would require no subsidized supplies to hospitals or maternity wards. "If one is genuinely interested in infant health, what business does one have looking for loopholes? Evidently there is a lot of money to be made from the poor." Telephone interview with Dr. Peter Greaves, Senior Advisor in Nutrition for UNICEF (Jan. 18, 1990).

174. WHO Code, *supra* note 10, at art. 6.6. *See supra* note 169.

175. Letter from Nancy Gashott, Action Staff attorney, in response to letter from Thad Jackson, Nestle representative. Mr. Jackson had said that in accordance with the WHO Code, Nestle provides free and low-cost supplies to hospitals only when the requests are in writing. Ms. Gashott claims that the Resolution of 1986 called for an end to free and subsidized hospital supplies. Letter *reprinted in* ALTERNATIVES: QUARTERLY REV. (Spr. 89) (Alternatives is a non-profit organization encouraging responsible living).

176. WHA Resolution 39.28 [hereinafter Resolution].

177. Dr. Ransome Kuti, Health Minister of Nigeria, Delegate to WHA and sponsor of Resolution WHA 39.28 in a May 1989 statement of intent concerning the Resolution.

178. *Id.*

179. Dr. Mahler was the WHO Director in 1981 at the time of the WHO Code adoption. Letter to Dr. Eeva Kuuskoski-Vikatamaa, Finish Minister of Social Affairs and Health, from Dr. Mahler, Director General, WHO (Aug. 29, 1985) reprinted in The Boycott, *supra* note 94, at 7. *See*

The Resolution clarified article 6.6 of the Code by severely limiting those infants who would be able to receive free or subsidized supplies."[180] Moreover, the Resolution specifically limited the definition of "institution" in article 6.6 of the WHO Code by excluding maternity wards and hospitals from institutions that could obtain free or low cost supplies. Other U.N. affiliated organizations have continued to support the WHO's interpretation of the Code and the subsequent WHA Resolution.[181] As recently as 1989, UNICEF endorsed the Resolution and reiterated its belief that the drafters of the Code did not intend to include direct health care providers such as maternity hospitals as recipients of free or subsidized supplies.[182]

Public reaction to unrestrained marketing of breastmilk substitutes led to international activism which in turn caused the WHO and WHA to draft and pass the WHO Code. Recognizing the formula industry's major role in Third World infant feeding, the Code restricted the marketing practices of infant formula manufacturers.[183] The WHA Resolution attempted to clarify the ambiguous terms of the Code, but WHA interpretations were not universally accepted by the infant formula manufacturers, and controversy continued.

Resolution WHO/MCH/NUT/, *supra* note 176, at art. 86.1, ¶ 19. "Maternity wards and hospitals should not be recipients of free or subsidized supplies of breast-milk substitutes." *Id.*

180. Resolution, *supra* note 176, at arts. 39.28; 2.6.

181. UNICEF has continually shown support for the WHO Code, espousing the benefits of breastfeeding and warning of the hazards of formula feeding. The 1988 UNICEF Annual Report declared that "[i]n the first six months, the risk of morbidity and death from diarrhea is respectively 15 and 25 times higher for children not receiving breastmilk, compared to those who have the immunological protection of an exclusively breastmilk diet." UNICEF Annual Report, 1988, *reprinted in* The Boycott, *supra* note 94, at 1.

182. "It has been shown that the ready availability of breastmilk substitutes can undermine the successful initiation of breastfeeding and because the quantities really needed by maternity wards and hospitals are so small, UNICEF advocates that these small quantities should be purchased." UNICEF, *UNICEF Position on Infant Feeding* 2 (July 10, 1989).

183. *See* CHETLEY, *supra* note 17, at 86.

IV. NESTLE'S ACTION

A. *The Response to the WHO Code*

The Nestle company claimed that since the Code was a recommendation targeted at governments,[184] the industry itself was under no legal obligation to enforce the agreement.[185] Nevertheless, Nestle promised to support the objectives of the Code while using best efforts to interpret its ambiguous terms.[186] Nestle maintained that the Code should retain flexibility and not restrict specific industry behavior.[187]

As a result of alleged marketing violations in the Third World, Nestle formed the Nestle Infant Formula Commission (NIFAC) to study the company's compliance with the WHO Code.[188] NIFAC

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184. For example, Mr. Thad Jackson, Nestle's Vice President for Nutrition Research and Development spoke at the U.S. Congressional subcommittee meeting in reaction to the negative U.S. vote on the Code. "... Nestle welcomes the World Health Assembly decision to adopt the WHO Code as a recommendation rather than a regulation.... We will continue to promote breastfeeding and insure that our marketing practices do not discourage breastfeeding anywhere."

185. Backgrounder, *supra* note 33. The WHA "urges all Member States: to give full and unanimous support... to translate the International Code into national legislation... to monitor the compliance with the Code." WHO Code, *supra* note 10, (introductory remarks by WHA).

186. Delegates from the WHO expressed concern that infant formula MNCs would not self-restrict their product promotion, and would look for loopholes in the WHO Code. These delegates warned "we may fall into the trap of the large multinational companies which are proposing various interpretations of the International Code to be applied in our countries." CHETLEY, *supra* note 17, at 118 (quoting representative from the Congo). Delegates from the WHO continued to express reservations concerning the sincerity of Nestle's promises to regulate promotional activities in developing countries. *Id.*

187. *See* POST & BAER, *supra* note 3, at 57.

188. NIFAC was organized on May 3, 1982, to investigate allegations that Nestle had been violating the Code. Its members were: Henry Andersen, pastor of Fairmount Presbyterian Church in Cleveland, Ohio; Dr. Lewis Barness, professor and chairman of the Department of Pediatrics at the University of South Florida; Robert Campbell, general secretary of the American Baptist Churches of the USA; Dr. Omar Fareed, member of the American Board of Internal Medicine and medical director of the Carr Foundation; Dr. Sheldon Margen, professor of Public Health at the University of California at Berkeley; Vijaya Melnick, special assistant for Policy and Bioethics at the National Institutes on Ageing of the US National Institutes of Health; Mildred Randall, associate professor at the School of Nursing of American University; Philip Wogaman, dean and professor at the Wesley Theological Seminary in Washington, D.C. Bishop Ricardo Ramirez, Bishop of Las Cruses, New Mexico also served for a short time on the commission. He was replaced by Fetaui Mata'afa, widow of the first prime minister of Western Samoa, founder and honorary president of the Western Samoa National Council of Women. CHETLEY, *supra* note 17 at 136; NIFAC letterhead. Nestle appointed former U.S. Secretary of State Edmund Muskie to chair the Commission. *Id.* at 119.

encouraged Nestle to introduce new infant formula labels in conformance with the Code and to remove advertising materials still in circulation.[189] The commission published reports assuring the public that Nestle was adhering to Code specifications in the Third World.[190] Although the chairperson maintained that the commission was independent, critics questioned its objectivity since NIFAC completely depended on Nestle for financing.[191] The public saw the commission as a public relations device that did more to polish the company's tarnished image than to reveal its blemishes.[192]

B. Nestle's Response to the International Boycott

The international boycott against Nestle did not end with the enactment of the WHO Code. The Code specifically states "non-governmental organizations. . . should draw the attention of manufacturers. . . to activities which are incompatible with the principles. . . of this Code."[193] NGOs took this language to heart,

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189. CHETLEY, *supra* note 17, at 120. Nestle estimates that its losses from implementation of the WHO Code ranged anywhere from $10-20 million. Sikkink, *Codes of Conduct*, *supra* note 122, at 828.

190. Duncan, *Nestle's Not Dumping Formula, Panel Finds*, L.A. Times, Nov. 17, 1988, at 2, col. 4; *The Formula Crisis Cools*, FORTUNE, Dec. 27, 1982, at 106; Green, *Nestle*, Reuters N.E. Service, Oct. 14, 1982; K. Victor, *A Former Senator, Secretary of State Returns to the Law*, Nat'l L.J., May 18, 1987, at 6.

Nestle published a press release, *Nestle Completes WHO Code Implementation Process*, and distributed documents to its staff outlining itemized implementation instructions to be taken by Nestle in countries that had not yet passed national legislation to implement the Code itself. CHETLEY, *supra* note 17, at 117-18. This document received wide publicity with over 115 U.S. newspapers and countless publications throughout the world reporting the story. *Id.* at 118. Despite the positive press, several representatives of the WHA in 1982 expressed strong reservations about Nestle's instructions to its employees. These delegates cited "unfortunate loopholes" in Nestle's strategies. *Id.* at 118 (quoting Dr. A. Maruping of Lesotho). "Marketing practices prohibited by the Code are approved of and encouraged by the Nestle document. My delegation is convinced no private sector has the right to amend the WHO/UNICEF Code." *Id.* Dr. A. Tarutia of Papua, New Guinea, called the Nestle document a "serious distortion of the WHO Code." *Id.*

191. CHETLEY, *supra* note 17, at 119.

192. *Id.* at 120-21.

193. WHO Code, *supra* note 10, at art. 11.4.

and closely monitored the behavior of the multinationals.[194] By 1984, only four significant differences of interpretation of the WHO Code remained between Nestle and the NGOs directing the boycott: limiting free supplies only to infants who have a medical need for them; cessation of personal gifts to health workers; revision of misleading literature; and inclusion of health warnings on all labels of infant formula, specifying the hazards of artificial feeding.[195]

The prolonged boycott took a financial toll on Nestle and forced the company to take firm steps towards resolving the issues in dispute.[196] Nestle agreed to meet with a UNICEF consultant in order to develop and test new educational materials and labels incorporating the requirements of the Code, and to limit gifts for health workers to inexpensive utility items devoid of product advertising.[197] Despite attempts to reach complete agreement, Nestle failed to resolve the controversy over Article 6.6.[198] Finally, in 1984, Nestle promised to make free or low cost supplies available only to mothers of infants who needed to be artificially fed. Nestle would use its own definition of "need" until WHO/UNICEF defined the term more specifically.[199]

As a result of the clarification conferences between Nestle and UNICEF, the seven year boycott against Nestle officially ended in 1984, with Nestle and the NGOs declaring a truce.[200] In this unprecedented armistice with non-governmental critics, Nestle pledged to fully implement the WHO Code.[201] Specifically,

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194. One of the major NGOs, International Baby Food Action Network (IBFAN) explains its dedication as being to the long-term campaign to improve infant health. The group networks participants in 70 countries who serve as breastfeeding counselors, Code watchers, or baby food company monitors. *See* IBFAN, Battling the Bottle (organization pamphlet); *see also infra* note 213.

195. CHETLEY, *supra* note 17, at 130.

196. It was estimated that Nestle had spent $5 billion in fighting the seven-year boycott, including lost sales and public relations costs. Salmon, *Milking Deadly Dollars*, *supra* note 90, at 47.

197. CHETLEY, *supra* note 17, at 131.

198. *See infra* note 209; *supra* notes 169 & 174 and accompanying text (discussing WHO Code art. 6.6).

199. CHETLEY, *supra* note 17, at 131.

200. *Id. See* Sikkink, *Codes of Conduct*, *supra* note 122, at 835.

201. Signed Jan. 25, 1984 by Carl Angst, Vice President of Nestle S.A. and William Thompson, representing the International Nestle Boycott Committee. CHETLEY, *supra* note 17, at 131.

Nestle promised that the company would provide detailed instructions for following the Code provisions to marketing representatives and infant formula salespeople.[202] The company would not engage in advertising or give free samples to mothers.[203] Nestle assured the NGOs that it would include statements with its product declaring the superiority of breastfeeding, and promised to translate product labels and warnings into local languages with pictorial messages when appropriate.[204] Finally, Nestle vowed to develop educational materials for use by health practitioners with their patients.[205] While all concerned parties hailed this agreement as a success, NGOs and WHO representatives continued to differ with Nestle on interpretation of various Code terms.

C. *Nestle's Interpretation of the "Supplies Ambiguity" and the WHA Resolution*

Although Nestle undoubtedly had taken major steps to change its promotional practices,[206] the company persisted in violating advertising and marketing guidelines of the WHO Code.[207]

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202. CHETLEY, *supra* note 17, at 132; Nestle, *Nestle Report on Infant Nutrition*, (Oct. 1989); Backgrounder, *supra* note 33 (discussing steps for implementation of the Code).

203. *Id.*

204. *Id.*

205. *Id.*

206. There was little dispute that Nestle's behavior improved after the boycott. For example, the company complied with many sections of the Code such as article 4.2 (information and educational materials to mothers should include clear information on the benefits of breastfeeding); article 5.1 (no promotion or advertising to the general public); and article 7.2 (information to health professionals should not imply that bottle-feeding is superior or equivalent to breastfeeding). *See* CHETLEY, *supra* note 17, at 128, 135. *See also supra* notes 202-05.

207. Alleged advertising violations against Nestle and other infant formula manufacturers exist to date. NGOs insist that although these manufacturers promised to withdraw all direct advertising, posters promoting formula have been found in Sri Lanka, 1988, (American Home Products (AHP)), Moringa Products, (Pakistan), 1988, (Cow & Gate), Thailand, 1988, (Ross), Philippines, 1988, (Nestle). Booklets to mothers advertising products were found in Singapore, while in Taiwan and Thailand racks in health care institutions contained company literature. In Pakistan the companies have their names printed along with mention of their formula on patient discharge cards and patient health folders despite the Pakistan Pediatric Association's recommendation that they cease this practice. IBFAN, *Still Breaking the Rules* 6-7, 11 (May 1988) [hereinafter *Still Breaking the Rules*].

Evidence showed that health care workers and hospitalized mothers were regularly receiving free formula.[208] Nestle continued to find no explicit prohibition against distribution of free supplies in either the original 1981 WHO Code or the 1986 Resolution.[209] The company maintained that their action in this regard was benevolent and designed to protect Third World infants.[210] In addition, the

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208. CHETLEY, *supra* note 17, at 128, 135. *See infra* note 210 and accompanying text (discussing Nestle donations of free supplies); *Still Breaking the Rules, supra* note 207, at 4-5. This practice violates WHO Code, art. 7.4: Samples of infant formula . . . should not be provided to health workers except when necessary for the purposes of professional evaluation or research . . . Health workers should not give samples of infant formula to pregnant women, mothers of ihfants and young children, or members or their families.

If institutions received formula donations, these would be considered free supplies, in violation of art. 6.6. *See supra* note 169.

209. With regard to the Resolution, Edmund Muskie, chairman of the Nestle Infant Formula Audit Commission (NIFAC) said, "The agreement . . . does not require Nestle to terminate supplies. If the World Health Assembly wants manufacturers to terminate free supplies, it should say so." L.A. Times, Nov. 17, 1988, at 2, col. 4. On the other hand, Dr. Mark Belsey, Chief of Maternal and Child Health at WHO, stressed in a radio interview that if he were working for Nestle, he would read the WHO Code as saying Nestle "should not be distributing free supplies." The Boycott, *supra* note 94, at 8.

Still unconvinced that restricting free supplies to hospitals would increase infant survival and raise the percentage of mothers who breastfed, Nestle attempted to effectuate its own pilot study. Nestle stopped all free and low cost supplies to hospitals in Thailand in 1988. Nestle, Nestle's Report on Infant Nutrition (Oct. 1989). This experiment was soon abandoned because of inadequate "scientific" controls. Telephone interview with Channing Riggs, Assistant Special Issues Director, Nestle Enterprises, Inc. (Nov. 14, 1989). At present, Nestle is working on a plan to implement two new pilot studies, in Guatemala and most probably The Ivory Coast. Telephone interview with Channing Riggs (Jan. 15, 1990). Ms. Riggs stated that because it would be disastrous and dangerous to the infants and mothers to pull out all free formula supplies at once, these studies will take time to implement.

210. "We believe that our product saves lives . . . in the absence of supplies, children will suffer." Telephone interview with Channing Riggs, Assistant Special Issues Director, Nestle Enterprises, Inc. (Nov. 14, 1989).

According to a 1988 Nestle report, Nestle donated a significant volume (over one percent total sales volume) of free infant formula to the following Third World countries:

Abu Dhabi	Kuwait
Argentina*	Lebanon*
Bahrain	Malaysia
Cyprus*	Mexico
Dubai*	Oman
Guatemala	Peru
Indonesia	Singapore*
Ivory Coast	Taiwan
Jordan	Thailand*

* signifies an over five percent total sales volume donation

Attachment from letter to Mr. Tim Smith from F. X. Perroud, Nestle S.A. (Mar. 25, 1988).

infant formula company expressed concern for the institutions themselves, stating that if the company terminated free supplies, the hospitals would suffer great economic hardships.[211]

Nestle's adversaries, on the other hand, found the company's magnanimous inclinations difficult to support, citing examples where Nestle had undermined national efforts to promote breastfeeding by providing free formula.[212] NGOs questioned Nestle's responsible marketing practices and cited examples of inconsistent "charitable" behavior evidencing action against the interests of the host country.[213] For example, research in Kenya showed that Nestle provides supplies to public hospitals even though there are no infants with a medical need, in violation of the WHO Code and a national ban on supplies.[214] Ironically, Nestle sends no free formula to Kenyan orphanages where infants must be fed on bottled milk.[215] These orphanages "no longer appeal to formula companies for donations because the companies never respond to their requests."[216] At the time of this writing, UNICEF

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211. Greenhouse, *Nestle's Time to Swagger*, N.Y. Times, Jan. 1, 1989, at 1, col. 2.

In response to this argument, James Grant, Executive Director of UNICEF, said, "Your reference to free supplies being intended to help hospitals that are hard pressed financially provokes understandable skepticism in many quarters, since it is recognised that it can lead to substantial abuse, especially as the WHA resolution makes it plain that it is only 'small amounts of breast-milk substitutes' that are needed for a 'minority of infants'". The Boycott, *supra* note 94, at 5.

212. NGOs pointed to the fact that in Brazil where Nestle has a monopoly on infant formula there are no free supplies given. On the other hand, in the Ivory Coast, where the government was making efforts to promote breastfeeding, Nestle increased its free supplies to hospitals, undermining the country's efforts to safeguard infant health. Salmon, *Milking Deadly Dollars*, *supra* note 90, at 46.

213. For example, the company sends free or low cost supplies only to those facilities that request them in writing on a form provided by Nestle. IBFAN has claimed that these requests are viewed by the hospitals as little more than receipt slips, signed by hospital staff when the formula is delivered. The Boycott, *supra* note 94, at 9; *see supra* note 194 (explaining IBFAN). The form is then reviewed for "reasonableness." In 1986 IBFAN conducted a survey of 26 hospitals in the Philippines which showed that of 46 health workers, fewer than half had ever seen the form and fewer than 9% could describe it with any detail at all. The Boycott, *supra* note 94, at 9 (*reprinted from* Monitoring Report, submitted by Douglas Clement to the Nestle Infant Formula Audit Commission Jan. 27, 1987).

A 1988 IBFAN study of 45 hospitals in four Asian countries found Nestle to be supplying formula to 80 percent of those institutions, in unreasonable quantities--enough to feed over 110% of all newborns. Salmon, *Milking Deadly Dollars*, *supra* note 90, at 45-46.

214. Salmon, *Milking Deadly Dollars*, *supra* note 90, at 45.

215. *Id.*

216. *Id.*

is unaware of any free donations of infant formula by manufacturers to Third World orphanages.[217]

Implementing their responsibility to monitor the WHO Code,[218] NGOs professed that Nestle continued to violate the Code by using prohibited advertising practices[219] and sending free supplies to institutions. As a result of these violations, Action for Corporate Accountability (ACA)[220] threatened to renew the boycott against Nestle unless the company would accept the WHA resolution and take major steps to stop the donation of free infant formula to hospitals which indirectly supplied mothers.[221] This time no agreement could be reached. On October 4, 1988, the fourth anniversary of the end of the first boycott, NGOs commenced the second boycott against Nestle, this time adding American Home Products, Nestle's closest competitor in the infant food market.[222] NGOs issued a declaration[223] to Nestle demanding that the

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217. Telephone interview with Dr. Peter Greaves, Senior Advisor in Nutrition to UNICEF (Jan. 18, 1990).

218. WHO Code, *supra* note 10, at art. 11.

219. UNICEF too had "serious misgivings on Nestle's interpretation of significant aspects of the Code and on the possible harmful effects of its instructions in the implementation of the true spirit and intent of the code." CHETLEY, *supra* note 17, at 119.

220. A branch of IBFAN, ACA is based in Minneapolis and operates under the direction of Ms. Janice Mantell. ACA's purpose is to promote and protect breastfeeding and appropriate weaning practices, and the organization has been actively promoting the second boycott against Nestle. Telephone interview with Janice Mantell (Nov. 14, 1989).

221. ACA implored Nestle to come up with a plan detailing how and when it would stop pushing free supplies in maternity wards and hospitals. Reuters Bus. Rep., *Consumer Group Threatens Renewed Nestle Boycott*, June 28, 1988.

222. American Home Products has approximately 20% of the worldwide infant formula market with annual sales of over $5 billion. It markets infant formula through its subsidiary, Wyeth. Salmon, *Milking Deadly Dollars*, *supra* note 90, at 47. It is alleged to be using "its influence with powerful, pro-industry forces to attempt to dismantle or sabotage efforts to curb industry practices." *Id.*; *see infra* note 236 (discussing lobbying and MNC influence).

Only two months after the second boycott was called, support had spread in over 20 countries, doubling the international support of the first. The second boycott is focusing on two products for intensive action, Taster's Choice Coffee and Carnation Coffeemate from Nestle, and Advil and Anacin from American Home Products Company. Salmon, *Milking Deadly Dollars*, *supra* note 90, at 48.

223. ACTION FOR CORPORATE ACCOUNTABILITY, Declaration to Nestle, (Aug. 1989) (letter by Church and health activists imploring Nestle to stop all free supplies to hospitals and maternity wards). Signatories on the Declaration include: Timothy Smith, Executive Director, Interfaith Center on Corporate Responsibility; Janice Mantell, Executive Director, Action for Corporate Accountability; William P. Thompson, Associate Secretary General, World Council of Religion and Peace, Former Stated Clerk of the General Assembly of the Presbyterian Church; Patricia Yound, Chair,

company honor its 1984 agreement and cease all advertising and marketing violations of the WHO Code.[224]

Although in theory the WHO Code was internationally accepted, Nestle did not feel a legal obligation to abide by all the provisions. Furthermore, interpretations of several articles in the Code proved ambiguous. NGOs took an active role in monitoring Nestle's activities in the Third World, and led an international boycott against the company for failing to comply with the Code. After enduring seven years of boycott against its products, Nestle agreed to abide by the Code. However, controversy lingered over the interpretation of major sections of the Code, specifically those

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International Negotiators for Baby Food Code Compliance; Sister Regina Murphy, Sisters of Charity of New York; Neill Richards, Coordinator, Hunger Action Office, United Church Board for World Ministries; Sister Regina Rowan, Medical Mission Sisters; Richard Ullrich, Director, Marianist Office of Justice and Peace; Sister Barbara Aires, Chairperson, Ethics and Investments Committee, Sisters of Charity, New Jersey; Phil Johnson, Evangelical Lutheran Church in America; J. Andy Smith III, Ph. D, Director, Social and Ethical Responsibility Investments, American Baptist Churches (USA); Rev. William Somplatsky-Jarman, Director, Mission Responsibility Through Investment, Presbyterian Church (USA); Rev. Paul F. Wilson, Christian Church (Disciples of Christ); Sister Theresa Coulter, IHM, Conference on Corporate Responsibility of Indiana and Michigan; Sister Margaret Hormey, Sisters of St. Francis, (Indiana); Sister Susan Mika, OSB, Texas Coalition for Responsible Investment; Sister Susan Jordan, SSND, Coordinator, Midwest Coalition for Responsible Investment; Sister William Julie Hurley, SND, Coordinator, New England Coalition for Responsible Investment; Sister Betsy Clark, SSJ, Philadephia Area Coalition for Responsible Investment); Father Simeon Heine, SA, Coordinator for Peace and Justice, Friars of Atonement, Inc.; The Rev. Kinmoth W. Jefferson, National Division, General Board of Global Ministries, The United Methodist Church; Gerald J. Frendreis, FSC, Director of Socially Responsible Investing, Christian Brothers Investment Services, Inc.; Sister Sheila Miller, RSM, Mercy and Justice Committee, Sisters of Mercy, Rochester, NY; Sister Kathleen L. Uhler, OSF, Director, Center for Justice, Buffalo, NY; Sister Marian M. Adrian, GNSH, Grey Nuns of the Sacred Heart, Albion, NY; Melva B. Jimerson, Church of the Brethren; Father Michael H. Srosby, OFM, Midwest Capuchin Province; Rev. Paul Gaudet, OMI, Justice and Peace Commission, Missionary Obligates of Mary Immaculate; L.N. Thurber, Division of Overseas Ministries, National Council of Churches in Christ, USA; Joyce Soyl, Treasurer, Women's Division, General Board of Global Ministries, United Methodist Church; Anne D. Martin, Controller, Church Women United; Sister Patricia Marshall, SBS, Chairperson, Social Justice Commission, Sisters of the Blessed Sacrament, PA; Sister Judith Metz, SC, Sisters of Charity of Cincinnati; Jane Hull Harvey, Board of Church and Society, The United Methodist Church.

224. *Id.* In a 1988 study by IBFAN, labeling violations were found in regard to pictures of babies on the product. Violators included: Snow Brand, American Home Products, (Wyeth), Meiji, Abbott/Ross, Boots, Namyang, Maeil, Miluppa, Nutricia, CCF and Sulgen Milk Powder Works. Inadequate instructions for preparation violators included Abbott-Ross, Dumex, Bristol Myers (Mead Johnson), Boots, Meiji, Milupa, Moringa, Nestle, Nutricia, Snow Brand, AHP/Wyeth, Nutricia, CCF, Lijempf and Namyang. Instructions were found to be nearly illegible or only in English. Salmon, *Still Breaking the Rules*, *supra* note 207, at 10; Babies Before Profits, *supra* note 16, at 10; *see supra* note 207 and accompanying text (discussing advertising violations).

dealing with free supplies. Even after the WHA attempted to clarify the Code with the "Supplies Resolution," discrepancies persisted. With the issues deadlocked, NGOs commenced the second international action against the Nestle corporation. At the time of this writing, the boycott remains in force.

V. THIRD WORLD LEGISLATIVE EFFORTS

A. *Response to the WHO Code*

When the WHO Code received nearly unanimous support from the delegate nations, efforts from all involved groups towards the resolution of the infant formula issues had reached its apex. Unfortunately, the domestic legislative events in individualized nations immediately following the enactment of the Code were anticlimactic. Various governments reviewed the Code's provisions but countries were slow in passing legislation to accept them in full.[225] By mid-1988, seven years after the inception of the Code, only seven countries world-wide had fully embraced it as law.[226]

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225. Examples of workshops and legislative attempts cited in INT'L DIGEST OF HEALTH LEGISLATION (1983) include: Measures Adopted in Australia for Implementing International Code of Marketing of Breast-milk Substitutes (1984); Directing Council of PAHO Adopts Resolution on Infant & Young Child Nutrition; European Parliament Adopts Resolution on International Code of Marketing of Breast-milk Substitutes (1981); National Workshop on Infant & Young Child Feeding (Bangui, Central African Republic) (Nov. 16-26, 1981); Codex Alimentarius Commission Adopts Recommended International Code of Hygienic Practice for Foods for Infants & Children (1981); Belgian Health Authorities Issue Circular on Breast-feeding and Breast-milk Substitutes (1982); European Parliament Adopts Second Resolution on the International Code of Marketing of Breast-milk Substitutes (1983); United Kingdom's Reports on Infant Formula (1982); Agreement Signed in Denmark for the Implementation of the International Code of Marketing of Breast-milk Substitutes (1984); Workshop on Infant & Young Child Feeding (Lilongwe, Malawi) (Dec. 14-17, 1982). *See* CHETLEY, *supra* note 17, at 106, 124.

226. The countries which have adopted the Code as law are: The Philippines, Sri Lanka, Brazil, Guatemala, Peru, Kenya, and Mexico. Out of these seven, only Mexico has not taken substantial steps to discourage bottle-feeding. (Code by Country Chart). The Philippines National Code was signed into effect on Oct. 20, 1986, by President Corazon Aquino. Philippine Code of Marketing of Breast-milk Substitutes, Executive Order No. 51; *see* Babies Before Profits, *supra* note 16, at 13. There is conflicting authority on the present effectiveness of the Code. According to sources at Nestle, Nestle has totally withdrawn from the Philippine market. Telephone interview with Channing Riggs, Assistant Special Issues Director, Nestle Enterprises, Inc. (Nov. 14, 1989). According to Balikatan at Ugnayang Naglalayong Sumagip sa Sanggol (BUNSO), an active infant formula NGO umbrella organization under which 65 community based groups address breastfeeding

Some twenty-four nations had adopted the Code in part as law; fifteen had government controls on infant formula distribution; thirty-eight were awaiting pending legislation; thirteen implemented the Code only as a voluntary measure; sixteen had some provisions accepted as voluntary measures; twenty-two were still studying the Code; and five had no national restrictions, but had industry codes in effect. Twenty-nine countries had taken no legislative action at all.[227] Members of the WHO had hoped that the Code would be presented to legislatures for adoption, but the influence of the economically and politically powerful MNC proved to be a major stumbling block.[228]

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issues, Nestle is still distributing free supplies. Babies Before Profit, *supra* note 16, at 14 & 16.

227. State Of The Code By Country Chart, IBFAN/IOCU (1988). Malawi, for example has attempted to pass legislation. A national workshop was called in response to recommendations made in the Code. The workshop reviewed the Code, endorsed all its provisions and recommended that the Ministry of Health use the Code as a basis for national legislation. In addition, the workshop made recommendations for the education of mothers, healthcare workers and traditional birth attendants regarding the importance of breastfeeding and its management, child spacing, appropriate weaning practices and the production and preparation of locally grown weaning foods. Representatives asked that the government begin a study of cultural taboos and institute controls over the import, distribution, and sale of breastmilk substitutes. The Chairman of the Workshop (representing the Ministry of Health) assured all participants that their recommendations would be taken to the highest level. INT'L DIG. OF HEALTH LEGIS. 34, (1983).

The government of Kenya banned free formula supplies or baby bottles in government hospitals but took no action to limit the same in private facilities. Conditions in Kenya were once so bad Kenyans invented a word, "chupa-itis" to describe diarrhea and dysentery in bottle-fed babies (chupa means bottle in Kiswahili). *Problems of Developing Economies Sidetrack Infant Feeding Reform*, J. OF COM. (Aug. 1989). *See supra* note 225 and accompanying text.

228. Other factors in Third World countries, including bureaucratic inertia, inhibited infant formula legislation. CHETLEY, *supra* note 17, at 110. *See* Recent Development, *The Implementation Process of the International Code of Marketing of Breastmilk Substitutes* SYRACUSE J. INT'L L. & COM., 161, 163. One commentator suggests that:

> Host countries should require the affiliates of multinational corporations to reveal to them any sales prohibition and restrictions in manufacturing imposed by home or other host countries with respect to the protection of the health and safety of consumers. They should then decide whether similar restrictions or warnings should be imposed on the sale and manufacture of these products in their countries; in such cases, these measures should apply to similar products regardless of their origin.

Note, *Influencing Multinational Corporations: the Infant Formula Marketing Controversy*, 10 N.Y.U. J. INT'L L. & POL., 125, 162-63.

B. MNC Influence

The MNC aids impoverished economies through the creation of an economically symbiotic relationship.[229] The MNC negotiates for a favorable environment in the host country in order to establish a subsidiary or plant.[230] Once settled in a favorable environment, the company becomes financially enmeshed in the country's development; both nationals and the government enjoy the influx of new capital.[231] When a country's economy is dependent on the wealth of the MNC, the company's interests are also affected.[232] To protect these interests, the MNC lobbies

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229. In Brazil, for example, Nestle has 95% of the infant formula market because it has incorporated itself into the governmental and societal structure. Since the 1920s and 1930s the Brazilian government has initiated policies to promote foreign investors and new industries. The MNC has continued to encounter a friendly environment in Brazil, as the foreign capital that is brought in remains, as the Brazilian elite believe, essential to the nation's growth. Nestle, by taking advantage of liberal laws and fiscal incentives offered by the Brazilian government, has firmly established itself in the Brazilian economy. Nestle representatives have served on national commissions and subcommissions which dictate the norms of food production and processing. Thesis, *supra* note 30, at 38-47.

230. Kierans, *The Community and the Corporation*, in THE MULTINATIONAL CORPORATION IN THE 1980S 201-02 (Kindleberger & Audretesch eds. 1983). "Governments identify growth and development with commercial corporations and shower them with subsidies, tax privileges, appropriate labor legislation, and market protection to attract a commitment and investment." *Id.*

"The host government's power is greatest just prior to MNC entry; after the investment has been made, social groups dependent on the new industry as well as negotiators themselves come to support the MNCs' interests and the government's position becomes weaker." Newfarmer, *Multinationals and Marketplace Magic*, in THE MULTINATIONAL CORPORATION IN THE 1980S 186-87 (Kindleberger & Audretsch eds. 1983).

231. The MNC buys the resources it needs from the host country, employs nationals and contributes in the social and political spheres to their host country's economy. The relationship is one that is beneficial to both MNC and host country, but one which can easily lead to manipulation of the host country by the MNC. Continuing success of the company becomes imperative not only to those nationals employed by the company, but also to those in government who indirectly depend on the steady flow of capital within the country. *See* Thesis, *supra* note 30, at 1-10.

"Due to the size of the MNEs [multinational enterprises] and the manner in which the MNE system works, host governments may lose control over important sectors of their economies." Yelpaala, *Alternatives to Tax Incentive Policies*, 7 NW. J. INT'L L. & BUS. 208, 239-40 (1985). *See* Kierans, *The Community and the Corporation*, in THE MULTINATIONAL CORPORATION IN THE 1980S 201-02 (Kindleberger & Audretesch eds. 1983).

232. "[C]orporate oligopolies, supported, financed and encouraged by their respective governments, become even greater compounds of wealth and economic power . . . ." Kierans, *The Community and the Corporation*, in THE MULTINATIONAL CORPORATION IN THE 1980S 215 (Kindleberger and Audretsch, eds. 1983).

against legislation which could interfere with its freedom within that country.[233]

The MNC's main objective is to increase its wealth and assets.[234] Abundant financial resources enable the MNC to promote its products in order to recover its initial capital outlay and maximize economic growth within the host country.[235] Thus, the infant formula MNC uses its economic strength to deter restrictive national legislation which adversely affects its profits.[236] To date,

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233. Thesis, *supra* note 30 at 8-9. See *infra* note 236 and accompanying text concerning Ghana. When legislation is attempted, the manufacturer together with its allies fight to successfully block its passage. Local entrepreneurial groups more concerned with profits than with competing with the MNC join in rallying behind the infant formula manufacturer. Regional public officials, individuals associated with finance ministries and the elite usually side with the foreign firm during conflicts with the nation-state. This allows the formula industry to maintain partial control of their foreign environment. Thesis, *supra* note 30, at 8-9. With the support of a nation's major constituencies, legislation restricting MNC behavior will most likely be defeated.

234. Kierans, *The Community and the Corporation*, in THE MULTINATIONAL CORPORATION IN THE 1980S 201-02 (Kindleberger & Audretsch eds. 1983).

> It is in the very nature of the commercial corporation, large or small, to drain a market or an environment. Just as plants suck up moisture from the earth, so do corporations draw out and drain the surpluses inherent in the contributions of labor and the resources of nature. The primary objective of the corporate invader is to increase its own wealth and assets, not the level of community income.

Id.

235. The gross annual sales of the top ten MNCs are greater than the GNP of 80 countries. Thesis, *supra* note 30, at 3, n.6.

236. For example, if countries enact legislation prohibiting sales or donations of formula in hospitals, the companies will suffer economic losses. "The purpose of the industry in bringing the formula to hospitals is to induce sales; this is its one and only purpose." Salmon, *Milking Deadly Dollars*, *supra* note 90, at 47. Lobbying efforts are not uncommon. Infant health activists have seen this interference as morally reprehensible. *See* J. OF COM., (1989); *supra note* 158 and accompanying text (discussing the reaction to alleged U.S. lobbying efforts).

One commentator expresses the view that "... political confrontation becomes inevitable both within and between nations" when MNCs become more powerful within a host country. Kierans, *The Community and the Corporation*, in THE MULTINATIONAL CORPORATION IN THE 1980S 215 (Kindleberger & Audretsch eds. 1983).

Nestle, for example, has exercised considerable control of infant formula regulation through political influence in Ghana. At the end of 1987, the government had a $22 billion debt. As the country's largest foreign food producer, Nestle supplies the Ghanian populace and government with much needed capital. Nestle employs 625 Ghanaians and supplies a substantial amount of foreign exchange to the national treasury since it buys raw materials for local production from government enterprises. *Problems of Developing Economies Sidetrack Infant Feeding Reform*, J. OF COM. (Aug. 8, 1989). NGOs allege that despite a commitment to allow the country to engage in independent decisions concerning regulation of infant formula, Nestle interfered with Ghana's legislative process by imploring government officials to vote against infant formula legislation. *See* Letter From Dr. C. Gardinar Ministry of Health, Apr. 10, 1989 from M.E. Mathys, Managing Director Nestle, Ghana (discussing the proposed Ghana National Code). *See also Letter Indicates Promise Broken*, J. OF

little meaningful legislation regulating the marketing of infant formula exists in these impoverished nations.[237]

C. *Hope for the Third World Infant Formula Problem*

Third World governments must take an effective stand to regulate the formula industry within their struggling nations. To do so, these governments must recognize the nature of the infant formula controversy. It is a two-fold dilemma: first, unregulated promotion and use of formula in developing nations imperils infant health; and second, MNC attempts to block marketing regulations result in exploitation of the vulnerable Third World market. Upon full acknowledgement of the problem, developing nations must reach out to developed countries for economic support.[238] Foreign assistance programs have been established not only to assist the Third World in gaining economic independence, but also to educate

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COM. (Aug. 8, 1989). Nestle has defended its action claiming that the company was asking the government of Ghana not to adopt the legislation because it was too broad and included weaning products as well as infant formulas. Telephone interview with Channing Riggs, Assistant Special Issues Director, Nestle Enterprises, Inc. (Nov. 14, 1989).

237. *See supra* note 225-27 and accompanying text (listing those countries which have not yet passed legislation regarding infant formula restrictions).

238. The U.S. spent $8.95 billion on foreign aid, more than any other country in 1987, but ranked next to last among industrialized nations in terms of donating a percentage of the country's gross national product (GNP), at 0.20%. Only Austria (0.17%) ranked lower. Norway was highest in terms of donating a high percentage of its GNP. Some percentages of GNP for foreign aid donations in 1987 were: Norway, 1.09% ($0.89 billion); Netherlands, 0.98% ($2.09 billion); Denmark, 0.88% ($0.86 billion); Sweden, 0.88% ($1.38 billion); France 0.74%, ($6.52 billion); Finland, 0.5%, ($0.43 billion.); Japan 0.31%, ($7.45 billion). U.S. AGENCY FOR INT'L DEVELOPMENT, 6 U.S. Aid Highlights (Spr. 1989). At present, over two dozen industrialized countries provide international government assistance programs to developing states, providing over $40 billion annually to more than 150 recipient countries. *Id.* These programs are designed to help educate and train the people of the affected nations to utilize the resources available to them and gain economic independence. For example, health assistance programs are funded by the U.S. government through the U.S. Child Survival Account (estimated fiscal year 1989, approximately $120,000, and approximately $126,000 requested for fiscal year 1990) and the Health Account (approximately $2 billion). Along with the U.N., these U.S. government programs provide technical assistance promoting health, water and sanitation projects in the Third World. In addition, the U.S. assistance program, the Improving Maternal and Infant Diet Project (931-1010) "has promoted breastfeeding, developed and promoted weaning foods from local food products, educated mothers in appropriate infant feeding techniques and provided lactation management training for health care professionals." U.S. AGENCY FOR INT'L DEVELOPMENT, *Congressional Presentation, Fiscal Year 1990*, 61 Main Volume.

and train health workers specifically in lactation management.[239] Once the decision to sever ties of economic dependency on the formula company has been made, the affected country is ready to take positive action to regulate the promotion and use of infant formula. Only at this time can effective and meaningful legislation be passed and implemented.

CONCLUSION

Misuse of infant formula in developing countries has become an egregious problem resulting in the death of millions of infants and hindering the social and economic development of poor nations.[240] Improper use of infant formula is a human-made problem, a result of modern achievements in infant feeding thrust too quickly upon nations not yet ready for such innovations.[241] Despite more than twenty years of controversy, the infant formula problem remains a haunting reminder to industrialized nations that product safety is directly dependent upon the user's environment.

The Third World mother is unable to fully comprehend the possible repercussions of infant formula feeding, and environmental conditions in poor countries intensify the difficulties surrounding safe formula practices. To combat the grave danger inherent in the use of this product, Third World governments must take an effective stand to gain independence from the MNCs. Only after

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239. These programs have proved successful in reducing infant mortality in several Third World countries. "Training of physician-nurse teams in Honduras, Guatemala, Indonesia, Philippines, Thailand, and Kenya in lactation management has led to major changes in hospital practices (with resulting cost savings), which have led to substantial increases in the proportion of women initiating breastfeeding, and ultimately to duration of breastfeeding." U.S. AGENCY FOR INT'L DEVELOPMENT, *Congressional Presentation, Fiscal Year 1990*, 61 Main Volume. *See* Wellstart, International Lactation Management Education Program, Breastfeeding and Child Survival.

One U.S. based program, Wellstart, formerly the San Diego Lactation Program, has been offering its educational program to physician-nurse teams since 1983 through funding from the U.S. government (U.S. AID). *Id.* Wellstart's International Lactation Management Education Program educates health professionals from Third World countries, providing follow-up support in 28 teaching hospitals. *Id.* Wellstart has educated 131 health professionals from 15 developing countries. *Id.*

240. *See supra* note 4 and accompanying text discussing infant deaths; Salmon, *Still Breaking the Rules*, *supra* note 207, at inside cover (quoting from Joint WHO/UNICEF Meeting on Infant and Young Child Feeding (Oct. 1979)).

241. *See Still Breaking the Rules*, *supra* note 207,

governments establish true control over their own countries can any affirmative steps be taken to control the marketing of infant formula, a product which has proved unrelentlessly to be dangerous within Third World environments. These developing countries must effect strong national legislation. Liability for marketing infant formula responsibly and in respect for the rights of infants needs to be placed on those with full knowledge of the problem, the infant formula MNC. Threatened with severe sanctions for violations, multinationals will have incentive to abide by legislative regulations. Enforcement of an effective code will afford Third World infants the greatest opportunity of being breastfed. One day, through education and public awareness, all mothers will be able to make informed choices regarding breast or formula feeding. Until that day, infant formula remains a dangerous product which must be effectively controlled.

The following is a proposed law that may be adopted by all affected countries to ensure that their state's present and future generations are protected against the dangers of improper marketing and misuse of infant formula.

THE UNIVERSAL CODE

PREAMBLE[242]

Affirming the right of every child and every pregnant and lactating woman to be adequately nourished as a means of attaining and maintaining health;

Recognizing that infant malnutrition is part of the wider problems of lack of education, poverty and social injustice;

Conscious that breastfeeding is an unequalled means of providing ideal food for the healthy growth and development of infants, serving as a unique biological and emotional basis for the health of both mother and child;

Recognizing that inappropriate feeding practices lead to infant malnutrition, morbidity and mortality in all countries and that improper practices in the marketing of breastmilk substitutes can contribute to these major public health problems;

Believing that, in the light of the foregoing considerations and in view of the vulnerability of infants in the early months of life, and the risks involved in the unnecessary and improper use of breastmilk substitutes, the marketing of breastmilk substitutes requires special treatment which makes usual marketing practices unsuitable for this product;

THEREFORE:

To inform those who will be involved in infant feeding of the potential dangers involved with unsafe formula use and to restrict the advertising and marketing of infant formula so as to promote only the safe use of infant formula in suitable environments;

The following articles are presented for legislative enactment.

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242. *See* WHO Code, *supra* note 10, Preamble.

ARTICLE I. DEFINITIONS[243]

A. Advertising: Any publicizing of a breastmilk substitute or infant formula, either directly or indirectly, through public or private channels, espousing claims of superiority, inducing recognition of brand name, or breastmilk substitute or infant formula interest arousal. Advertising includes any solicitation through public or private channels intended or reasonably expected to cause breastmilk substitute or infant formula awareness.

B. Breastmilk Substitute: Any food, including homemade gruels, representing a partial or total replacement for breastmilk, whether or not suitable for that purpose.[244]

C. Container: Any form of packaging, including wrapping, of breastmilk substitutes or infant formula retail units.[245]

D. Distributor: Any manufacturer, supplier or individual engaged in the business and process of dispersement of infant formula, including their agents.[246]

E. Donations: Any supplies or samples of infant formula given by the distributor at low or no cost to an entity or individual.[247]

F. Gift: Any financial inducements or promises of financial inducements including, but not limited to money, commissions, favors, services, products (excluding infant formula donations), or any other material embellishments.

G. Health Care Facility: An individual governmental, non-governmental or private institution or organization within the health

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243. The following definitions are derived from the WHO Code. *See* WHO Code, *supra* note 10, at art. 3.

244. Third World women prepare home formulas from grains and fruits available in the region. These foods may be used for weaning and may supplement breastmilk feeding. Although gruels were not included in the WHO Code definition of breastmilk substitutes, they are included in this Code to indicate that their improper use is undesirable for newborns. *See* WHO Code, *supra* note 10, at art. 3.

245. *Id.*

246. *Id.* The definition of "distributor" has been altered from the WHO definition in order to define the term with more precision.

247. The WHO Code does not define this term. Since major controversy developed over the term "supplies" in the WHO Code, it is imperative in this Code that all words which may be synonymous with the term "supply" be clearly defined.

care system. Health Care Facility includes the private practice of individual health workers.[248]

H. Health Care System: The aggregate of all governmental or private institutions or organizations within one nation engaged directly or indirectly in medical health care for mothers, infants, and pregnant women. Health Care System includes nurseries and child-care institutions.[249]

I. Health Care Practitioner: A physician, midwife, nurse or other individual engaged in the treatment of pre-natal care, childbirth, or post-natal care, who is licensed, registered or otherwise permitted by the government to offer such care.[250]

J. Health Care Worker: A person, including voluntary, unpaid individuals, working in a health care facility.[251]

K. Infant Formula: A breastmilk substitute formulated industrially in accordance with applicable host government standards to satisfy the normal nutritional requirements of newborn infants.[252]

L. Institution: Any facility, public or private, accommodating infants temporarily or permanently separated from their mothers. Temporary separation denotes those situations where the mother is unable to parent for a significant amount of time and does not include routine short-term separations requiring merely day care.[253]

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248. The WHO Code neglected to define health care facility.

249. The definition of health care system is similar to that found in the WHO Code. WHO Code, *supra* note 10, at art. 3.

250. *Id.* The WHO Code defines health worker, but not health care practitioner. In the Universal Code, more responsibility is placed on the professional, therefore necessitating the distinction between health care worker and health care practitioner.

251. *Id.*

252. Although basically derived from the WHO Code, the definition of infant formula in the WHO Code includes home-prepared formulas. In this Code, home-prepared formulas are found under the definition of breastmilk substitutes. *Id.*

253. "Institution" was an ambiguous term which was not defined in the WHO Code. Continued controversy as to whether hospitals were institutions resulted in an attempted clarification in the 1986 Resolution. For this reason, this Code creates a distinction between hospitals and health care facilities. Infants without mothers, such as those housed in orphanages or placed in accommodations apart from their mothers because of mental or physical handicaps, require special feeding. These infants should be fed formula only when breastmilk is unavailable.

M. Label: Any tag, brand, mark, pictorial or otherwise descriptive matter, written, printed, stenciled, marked, embossed, impressed on, or attached to a container.[254]

M. Manufacturer: A corporation or other entity in the public or private sector engaged in the business or function of manufacturing infant formula whether directly or through an agent or entity controlled by or under contract with the corporation or entity.[255]

O. Marketing: Promotion, distribution, sales, or advertising of infant formula including public relations and information services.[256]

P. Marketing Personnel: Any person whose duties, responsibilities or functions involve the marketing of infant formula.[257]

Q. Sample: Single or small quantities of infant formula provided without cost directly or indirectly to the patient, the patient's family or any consumer.[258]

R. Supply: A quantity of infant formula provided free or at a nominal price to an institution or health care facility for use over an extended period.[259]

S. Unit: An individualized container of infant formula ultimately sold or given to the consumer.[260]

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254. WHO Code, *supra* note 10, at art. 3.

255. *Id.*

256. *Id.*

257. *See id.*

258. The WHO Code did not apply the term "sample" to consumers, rather the term was defined very generally as dealing with small quantities of donated formula. Because of the problems in the WHO Code concerning free or low cost formula to mothers, hospitals and institutions, it is important to show the difference in meaning between "supplies" and "samples." *See* WHO Code, *supra* note 10, at art. 3.

259. The WHO Code definition of "supplies" was not precise and did not differentiate free formula donated to consumers from formula donated to institutions. *Id.*

260. The WHO Code explained "unit" impliedly through its definition of container. The Universal Code makes the term "unit" precise.

ARTICLE II. INFORMATION AND EDUCATION

A. The host government will require the manufacturer to disseminate to health care practitioners and workers within the health care facilities and institutions information regarding infant, young child, and maternal nutrition. The manufacturer will ensure that objective and consistent information is provided to the aforementioned groups involved in the care of infants. The manufacturer is responsible for the planning, provision, design and dissemination of information.[261]

B. Informational and educational materials, whether written, audio, or visual, regarding the feeding of infants and intended to reach pregnant women and mothers of infants shall include clear information on all the following concerns:

(a) benefits and superiority of breastfeeding;

(b) maintenance of breastfeeding and maternal nutrition;

(c) the negative effect on breastfeeding of introducing partial or total bottle-feeding;

(d) difficulty of reversing the decision to not breastfeed; and

(e) proper use of infant formula as appropriate.

Such material must address the social and financial implications of infant formula use, the health hazards of inappropriate foods or feeding methods, and particularly, the health hazards of unnecessary or improper use of infant formula and other breastmilk substitutes. Such materials will not employ any pictures or text which may idealize the use of infant formula. If the languages of the targeted region are not written, pictorial images showing the dangers involved in misuse shall be affixed to each container. Comment: The WHO Code serves as an excellent starting point for explicitly enumerating the requirements for informational material; therefore, this Code has utilized the major points of article four of

261. *Compare* Art. II.A of proposed legislation *with* WHO Code, *supra* note 10, at art. 4.1. Wheras the WHO Code puts the entire responsibility for information and education on the host governments, the Universal Code puts a more shared responsibility on the host country and the manufacturer and distributor.

the WHO Code.[262] Sections II(A) and (B) above are designed to ensure that the final recipient of the breastmilk substitute or infant formula has received understandable information.

ARTICLE III. ADVERTISING & MARKETING PRACTICES RESTRICTIONS

A. Advertising:
1. The Code prohibits all direct or indirect advertising of infant formula to consumers or the general public.[263]
2. No health care facility or institution will be used for the purpose of promoting infant formula. No paraphernalia including infant formula logo or design, promoting infant formula, will be permitted in any health care facility or institution.[264]
B. Marketing:
1. Any gifts from infant formula distributors and manufacturers to any health care worker or consumer are prohibited.[265]
2. Any gifts from infant formula distributors and manufacturers directly to any health care facility or institution are prohibited. Gifts intended to benefit the health care system must be given to the governmental Committee described in Article V (A), who will decide whether a health care facility or institution can accept the gift. The Committee is responsible for the proper and fair disbursement of all gifts to the institutions and health care facilities.[266]
Comment: Section III (A) and (B) must be explicit in order to avoid promotional activities which are contrary to infant health. In addition, the Code must not contain ambiguities concerning government policy towards promotion or advertising of infant formula. By forbidding all health care workers and practitioners from accepting gifts but allowing in certain circumstances those gifts to be distributed by the governmental Committee, the Code

262. *See* WHO Code, *supra* note 10, at arts. 2-6.
263. *See id.* at art. 5.1.
264. *See id.* at art. 5.3.
265. *See id.* at arts. 7.3, 7.5, 8.1.
266. *See id.*

allows for the gifts to become property of the medical institution or government, but curtails the ability of the grantor to influence the recipient.

C. Donations:

1. All infant formula supplies and infant formula samples to any individual or entity other than an authorized government institution are prohibited.[267] Institutions must ask their government agency to provide them authorization for requesting donations of formula. Once the government representative has inspected and approved the institutional facility, the government shall give the institution authorization to request donations of infant formula.

2. If infant formula is being donated to an authorized institution, the original or duplicate copy of the written request from the appropriate institution specifying the amount requested and the number of infants in need shall accompany the shipment received. The written request shall be placed clearly on the front of the shipping box.

3. Each subsequent request by the institution will be treated as an original request and subject to the procedure in section B (2). In the event the distributor or manufacturer wishes to discontinue or reduce the quantity of infant formula donations, or change the product line of the formula being shipped, the distributor or manufacturer shall send notification directly to the institution within fourteen (14) days of the institution's expected receipt of the donation.[268]

Comment: As the major source of contention arose over the ambiguities in the WHO Code concerning the meaning of "supplies,"[269] all direct free or nominally priced supplies to medical institutions are prohibited in this Code. Government authorized institutions can request donations of formula and distribute free or nominally priced donated supplies to those infants who can be fed only by artificial formula.

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267. *See* WHO Code, *supra* note 10, at arts. 6.6, 7.4.
268. *See id.* at art. 6.7.
269. *See id.* at arts. 6.6, 6.7, 7.4.

ARTICLE IV. PURCHASING RESTRICTIONS

A. Health Care Facility:
1. All distribution of infant formula to purchasing consumers must be accomplished through a health care facility in accordance with Article IV A. The government shall decide by assessing the size of the facility and the location, which health care facilities are to be the consumer outlets for formula purchasing.
2. For every 500 units of infant formula purchased by a health care facility, the manufacturer must send a representative to conduct an orientation for health care workers on the proper use of breastmilk substitutes, with accompanying literature printed in all languages of the community.[270] Information to be included in this educational material is described in Article II B.
Comment: Distributors and manufacturers shall be responsible for informing the health care facility of safe infant formula use, since the health care facility will be dispensing the infant formula to consumers. The WHO Code did not regulate the dispensing of the breastmilk substitute or infant formula to consumers.[271] Since health care workers are in contact with the consumer, when these workers are educated as to the proper use of formula, they can share this knowledge with consumers.
B. Consumer:
1. Infant Formula will be purchased by the consumer only through appropriate health care facilities.
2. Infant Formula shall be treated as a prescription drug.[272] When medically required, formula must be purchased and received only

270. *See id.* at art. 7.1, 7.2.
271. *See id.* at art. 7. Basically this section asks manufacturers not to distribute certain materials creating a belief that bottlefeeding is superior or equivalent to breastfeeding, and only distribute scientific or factual information to the health care worker. WHO Code, *supra* note 10, at art. 7.4. The Universal Code puts the responsibility for education on the manufacturer who has more knowledge as to the dangers of the product and more resources available to ensure that with new technological advancements, updated information is distributed.
272. In Hungary, as well as Papua, New Guinea, the sale of infant formula requires a prescription. The increased health of infants and the increased incidence of breastfeeding has been attributed to such legislation. Oski, *Heating Up the Bottle Battle*, NATION, 684 (Dec. 4, 1989).

by prescription, prepared and authorized by a health care practitioner and distributed by a health care facility.
Comment: The WHO Code did not restrict distribution to consumers. Because of the dangers of misuse of formula[273] this Code limits distribution of infant formula by prescription. Health care practitioners are responsible for determining whether an infant requires formula, and the health care facility may sell the infant formula only upon receipt of the prescription. No public or private dispensaries including drug stores or pharmacies are authorized to disseminate infant formula. In this way, the dispensing of formula can be carefully controlled.
C. Institutions:
1. Institutions are to register with the government as authorized institutions. These institutions are then encouraged to supply needy infants with available breastmilk from breastmilk banks[274] before ordering infant formula from distributors or manufacturers.
2. If sufficient quantities of banked breastmilk are unavailable, formula may be purchased with proper documentation, as specified in Article III (B). Institutions may purchase infant formula directly or indirectly from the manufacturer or supplier with proper documentation if the institution is not supplied with adequate free or low cost supplies.
Comment: Institutions housing infants who cannot be fed by breast shall submit written requests with documentation to the health care facility. The WHO Code did not deal with methods of dispensing infant formula by the health care facility.

ARTICLE V. IMPLEMENTATION AND MONITORING

A. An inter-agency committee composed of the Secretaries of Health, Trade and Industry, Justice, and Social Services and Development or equivalent Secretaries or Ministers shall monitor the distribution of infant formula and shall have the authority to

273. *See supra* accompanying text on misuse of infant formula.
274. *See supra* note 36 on breastmilk banks.

recommend prosecution by governmental authorities for violations of the Code.[275]

B. Non-governmental organizations, professional groups, institutions and concerned individuals may bring to the attention of the Committee any alleged violation of the Code. After an investigation of such allegation, the Committee will present possible violations to the government which will begin the adjudication process.[276] If the government fails to take action to enforce the Code within ninety (90) days, any concerned citizen may bring a civil suit for penalties under this Code.

Comment: The government must be able to oversee the implementation of the Code. The WHO Code generally urged governments, with the assistance of NGOs and professional groups, to monitor compliance of the WHO Code by the manufacturer.[277] The WHO Code also encouraged formula manufacturers to take responsibility for monitoring their own practices.[278] By designating a *specific* group of individuals to oversee every aspect of these articles, the Code can impose liability on those who are not fulfilling their duties. If the government does not take criminal action, individuals have the authority to bring civil suits.

VI. SANCTIONS

A. Any distributor or manufacturer found to violate the Code, whether negligently or intentionally will be held guilty of a crime. The manufacturer/distributor's principal officers/directors responsible for compliance will be imprisoned for a maximum of one (1) year, or fined not more than the country's equivalent of

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275. *See* Philippine Code of Marketing of Breast-milk Substitutes, E.O. 51, §12 for an example of a national breastmilk code which institutes an inter-agency committee composed of the Minister of Health; Minister of Trade and Industry; Minister of Justice; and Minister of Social Services and Development.

276. *See* WHO Code, *supra* note 10, at art. 11.4. The WHO Code only allowed for reporting to top appropriate governmental agencies. The Universal Code requires reporting to the inter-agency committee.

277. *See id.* at art. 11.2.

278. *See id.* at art. 11.3.

five thousand dollars (U.S. $5,000), or both, for each violation discovered.

B. Any distributor or manufacturer held in violation of any of the provisions of this Code will also be subject to civil penalties.

C. Any health care practitioner, worker or institutional worker found in violation of the Code will be held criminally liable; upon a finding of guilt that individual will be subject to a prison sentence of not more than six (6) months, or fined not exceeding the country's equivalent of one thousand dollars (U.S. $1,000) or both.

D. Any health care practitioner, worker or institutional worker found in violation of the Code will also be subject to civil penalties for any violation.

E. Any other individual or group of individuals found to have obstructed implementation of the Code or the workings of the Committee will be subject to criminal prosecution as above in Article VI (A), as well as civil liability as outlined in Article VI(B).

Comment: In order to provide infant formula safely, the government of a developing country must adopt strict regulatory standards. The WHO Code is unworkable as legislation because it was passed as a recommendation to member states and contained no sanctions. Penalties which deter violators are a vital component of successful infant formula legislation. Since infant formula marketing and use may prove dangerous when improperly regulated, sanctions must be sufficiently severe to foster compliance. By attacking the transgressors economically and restricting their personal freedom, each government will ensure the greatest compliance with the law.

Nancy Ellen Zelman